DOCKET

No. 87-1428-CFX
Status: GRANTED

Title: Patricia A. Lorance, et al., Petitioners
v.
AT&T Technologies, Inc., et al.

Docketed:
February 26, 1988

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Goldstein,Barry L.

Counsel for respondent: Jackson,Charles C., Feinberg,Stephen J., Lee,Rex E.

NOTE: 1/19/88 ext. until 2/27/88 by Stevens, J.-cited

Entry	Date	Note	Proceedings and Orders
1	Jan 15 1988		Application for extension of time to file petition and order granting same until February 27, 1988 (Stevens, January 19, 1988).
2	Feb 26 1988	G	Petition for writ of certiorari filed.
4	Mar 21 1988		Order extending time to file response to petition until April 27, 1988.
5	Apr 25 1988		Brief of respondent AT&T Technologies, Inc. in opposition filed.
7	Apr 25 1988		Waiver of right of respondent AT&T Technologies, Inc. to respond filed.
6	Apr 27 1988		DISTRIBUTED. May 12, 1988
8	May 5 1988	X	Reply brief of petitioners Patricia Lorance, et al. filed.
9	May 16 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Sep 7 1988		Brief amicus curiae of United States and EEOC filed.
11	Sep 14 1988		REDISTRIBUTED. October 7, 1988
12	Oct 11 1988		Petition GRANTED. **********
13	Nov 9 1988		Record filed.
		*	Certified copy of C. A. proceedings received.
14	Nov 10 1988		Record filed.
		*	Certified copy of original record received.
16	Nov 21 1988		Order extending time to file brief of petitioner on the merits until December 9, 1988.
17	Dec 7 1988		Brief amicus curiae of United States filed.
18	Dec 9 1988		Joint appendix filed.
19	Dec 9 1988		Brief of petitioners Patricia Lorance, et al. filed.
20	Dec 20 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Dec 21 1988		Order extending time to file brief of respondent on the merits until January 23, 1989.
23	Jan 9 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Jan 19 1989		Order further extending time to file brief of respondent on the merits until January 26, 1989.
25	Jan 26 1989		Brief amicus curiae of Equal Employment Advisory Council

No. 87-1428-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
26	Jan 26 1989		Brief of respondents AT&T, et al. filed.
27	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 20, 1989. (1ST CASE.)
28	Feb 7 1989	G	Application (A88-627) to extend the time to file a reply brief from February 25, 1989 to March 7, 1989, submitted to Justice Stevens.
29	Feb 8 1989		CIRCULATED.
30	Feb 9 1989		Application (A88-627) granted by Justice Stevens extending the time to file until March 7, 1989.
31	Mar 7 1989	X	Reply brief of petitioners Patricia Lorance, et al. filed.
32	Mar 20 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1428

No. _____

Supreme Court, U.S.
FILED
FEB 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICIA A. LORANCE, *et al.*,
Petitioners,

v.

AT&T TECHNOLOGIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Should this Court grant certiorari to resolve a conflict among the circuits as to whether an employee must file a charge under Title VII of the Civil Rights Act of 1964 within 300 days of merely becoming subject to an intentionally discriminatory seniority system even though the system has not yet been actually applied to disadvantage the employee, or whether a charge is timely if filed within 300 days of a job demotion or other adverse action caused by the operation of the intentionally discriminatory system?

PARTIES IN THE COURT BELOW

The parties to the proceedings below were the petitioners Patricia A. Lorance, Janice M. King, and Carol S. Bueschen, who were appellants-plaintiffs in the lower courts, and AT&T Technologies, Inc., and Local 1942, International Brotherhood of Electrical Workers, AFL-CIO, who were appellees-defendants in the lower courts.

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No. ____

IN THE

UNITED STATES SUPREME COURT

October Term, 1987

PATRICIA A. LORANCE, et al.,

Petitioners,

vs.

AT&T TECHNOLOGIES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Patricia A. Lorance, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 19, 1987.

OPINIONS BELOW

The opinion of the court of appeals is reported at 827 F.2d 163 and is set out at pp. 3a-11a of the Appendix. The order denying rehearing, which is not reported, is set out at 1a-2a. The district court's memorandum opinion and order, dated August 21, 1986, which is not reported, is set out at 12a-33a. The Report and Recommendation of the United States Magistrate, dated March 21, 1986, which is not reported, is set out at 34a-50a.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1987. A timely petition for rehearing and suggestion for rehearing en banc was denied by the court on October 30, 1987. On January 19, 1988, Justice John Paul Stevens signed an Order extending the time for filing the petition for a writ of certiorari until

February 27, 1988. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire ... or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin....
>
> (c) It shall be an unlawful employment practice for a labor

organization-

> (2) to limit, segregate, or classify its membership ... in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee ... because of such individual's race, color, religion, sex or national origin....

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....

Section 706(e) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred..., except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially

> instituted proceedings with a State or local agency ..., such charge shall be filed ... within three hundred days after the alleged unlawful employment practice occurred....

STATEMENT OF THE CASE

Plaintiffs Lorance, Bueschen and King brought this Title VII action claiming that the defendants AT&T Technologies and Local 1942, International Brotherhood of Electrical Workers instituted a seniority system discriminatorily designed to limit the job rights of female workers who had recently promoted into traditionally male jobs. The lower courts failed to decide these claims because the courts determined that the plaintiffs did not file timely charges with the Equal Employment Opportunity Commission. The essence of the lower courts' rulings was that the plaintiffs had to submit charges timely filed from the date the plaintiffs became subject to the seniority system

rather than from the date that the system actually adversely affected their job positions.

At AT&T's Montgomery Works in Aurora, Illinois, women were historically assigned to lower-paid traditionally female jobs and men were assigned to higher-paid traditionally male jobs. In 1970 and 1971 the plaintiffs were hired into traditionally female jobs. At that time, the concept of plant seniority governed job promotions and job reductions-in-force. Given relatively equal qualifications the employee who had been employed for the longest period within Montgomery Works would be the first promoted and the last demoted or laid off.

Among the higher-paid hourly jobs were "tester" jobs. "[T]hese positions traditionally had been filled by men [but] by 1978 an increasing number of

women had used their plant-wide seniority to obtain jobs as testers." App. 4a. In late 1978 or early 1979, the defendant Electrical Workers created and proposed to the Company a dual seniority system, termed the "Tester Concept." Under this dual system a worker's date of initial assignment to a tester job established "job seniority" which applied to all job promotions and demotions in tester positions, while plant seniority applied to other matters, App. 16a; see, App. 4a.

After holding discussions about the Tester Concept at several union meetings, the union called a special meeting on June 28, 1979,[1] to vote on whether the Tester Concept should be adopted. The union membership approved the Tester Concept "by a margin of ninety votes to

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[1] The court of appeals decision erroneously stated the date as June 28, 1978, App. 5a; the correct date, June 28, 1979, is set forth in the district court opinion. App. 16a.

sixty -- approximately the ratio of men to women." App. 5a. The three plaintiffs, who were union members, opposed the adoption of the Tester Concept. Id. On July 23, 1979, the union and company signed an agreement adopting the Tester Concept, App. 5a, and in August 1980, the agreement was incorporated into the master contract, App. 17a.

At the time of the initial adoption of the dual seniority system, Lorance was a tester. In February 1980 King became a tester and in November 1980, the third plaintiff, Bueschen, became a tester. In the Summer 1982 the plaintiffs' job positions were adversely affected for the first time by the restructured seniority system. Plaintiffs Lorance and King were demoted from senior tester positions to lower-paying, junior positions, and Bueschen was demoted to a non-tester

position. App. 5a.

If the traditional plant seniority system had applied, the plaintiffs would not have been demoted. The plaintiffs filed charges with the Equal Employment Opportunity Commission in April 1983. App. 5a. These charges were filed within the time period prescribed by Title VII[2] if that period commenced from the date the dual seniority system caused the plaintiffs' job demotions.

In September 1983 the plaintiffs' filed their civil action. On March 21, 1986, the United States Magistrate recommended that the Court grant the Company's Motion for Summary Judgment.

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[2] Since Illinois is a "deferral state," that is, a state which has a fair employment practices commission which may grant relief to the victims of discriminatory employment practices, "Title VII claims brought in Illinois are generally subject to a 300-day period of limitation." App. 6a. The lower courts applied the 300-day period to this action. App. 6a n.2; App. 19a-20a n.3.

Although "unfortunate," the Magistrate determined that the plaintiffs "slept on their Title VII rights" because they did not file timely Title VII charges from the adoption of the new seniority system when it was "incorporated into the master contract ... in August of 1980 and ... published to the world." App. 48a-49a.

The district court declined to adopt the magistrate's report and rejected the magistrate's use of the "date of adoption" of the seniority system for the calculation of the filing period, but nevertheless granted summary judgment.[3] While noting that the plaintiffs' argument that they filed timely charges had "immediate appeal," App. 25a, the district court ruled that the time period

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[3] While the union never filed a motion for summary judgment, the court sua sponte entered judgment in favor of the union because the company's "motion is equally effective in barring the claim against" the union. App. 33a n.7.

commences from "the date [the plaintiffs] were forced to sacrifice their plant seniority rights under the 'Tester Concept.'" App. 32a.[4]

Although the Seventh Circuit found that "the plaintiffs' argument is logically appealing," App. 8a, the court rejected the plaintiffs' argument that the filing period may be triggered by the application of a discriminatory seniority system in a manner which actually injured the plaintiffs by causing their job demotion. Rather the court "conclude[d] that the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially neutral but discriminatory

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[4] Since Lorance was a tester when the dual system was initially implemented in July 1979, her filing period commenced as of that date. The filing periods for King and Bueschen commenced respectively on February 25, 1980, and November 30, 1980, the dates they became testers. App. 32a-33a n.6.

seniority system that the employee knows, or reasonably should know, is discriminatory." App. 9a.

In his dissent, Judge Cudahy argued that the majority's decision would fail its stated goal to obtain prompt resolution of challenges to seniority systems since women who promote in the future into the Tester jobs may still challenge defendants' dual seniority system. Also, Judge Cudahy concluded that there is no basis for applying different procedural rules to seniority systems which are facially-neutral but are created with an intent to operate discriminatorily than to systems which are facially discriminatory, and that the majority's decision "may encourage premature lawsuits." App. 10a.

On October 30, 1987, the Seventh Circuit denied the plaintiffs' petition for rehearing and suggestion for

rehearing en banc, although three judges, Cudahy, Easterbrook, and Ripple, voted to grant rehearing en banc. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE SEVENTH CIRCUIT AND OTHER CIRCUITS AS TO WHETHER THE APPLICATION OF A DISCRIMINATORY SENIORITY SYSTEM CREATES AN ACTIONABLE WRONG FROM WHICH AN INJURED WORKER MAY FILE A TIMELY ADMINISTRATIVE CHARGE.

The decision in this case is a sharp break from a uniform position among the circuits that each application of a discriminatory practice, such as a pay plan,[5] seniority system or entitlement to retirement benefits, constitutes an actionable wrong from which an employee may file a timely administrative charge.[6]

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[5] There was a single prior exception to this uniform rule which this Court reversed. Bazemore v. Friday, 106 S. Ct. 3000 (1986). See section II, infra.

[6] An individual who claims injury from an unlawful practice under Title VII must file a charge with the Equal Employment Opportunity Commission within 180 days after "the alleged unlawful

Although the Seventh Circuit recognized that this analysis of the other circuits "is logically appealing," App. 8a, the court rejected the analysis when it ruled that the job demotions suffered by Lorance, Bueschen and King as a result of the operation of the discriminatory seniority system were not actionable wrongs.

In conflict with the Seventh Circuit, four circuits have held that each application of a discriminatory seniority system or of a discriminatory collective bargaining agreement provision is a separate violation of fair

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employment practice occurred" or within 300 days if the individual instituted proceedings with a State or local agency. 42 U.S.C. § 2000e-5(e). In order to file a Title VII suit, an individual must have filed a timely charge. 42 U.S.C. § 2000e-5(g). The Age Discrimination in Employment Act (ADEA) contains similar provisions, 29 U.S.C. § 626(c), (d), which have been interpreted in the same manner as the Title VII time-filing provisions. See, n.8, infra.

employment law. In addition, a fifth circuit has recently explicitly rejected the ruling by the Seventh Circuit in Lorance.

Furthermore, three circuits have determined that the mere existence without an application of a discriminatory practice is an insufficient basis for a cause of action. However, the Seventh Circuit requires workers to forfeit their rights if they do not file charges of discrimination within 300 days of becoming subject to a discriminatory practice even though there has been no application of the practice. Although the plaintiffs filed timely administrative charges within 300 days of their job demotions, the Seventh Circuit dismissed their challenge to the gender-motivated seniority system[7] because they

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[7] If a seniority system is created with an intent to discriminate on the basis of gender, then it is not a "bona

failed to file timely charges from the date that they "bec[a]me subject to [the] facially-neutral but discriminatory seniority system...." App. 9a.

Contrary to the Seventh Circuit, the Second Circuit has held "that the alleged discriminatory violations [caused by a seniority system] ... must be classified as continuous ones, giving rise to claims accruing in favor of each

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fide" system and violates Title VII. See, Teamsters v. United States, 431 U.S. 324, 353-56 (1977). AT&T Technologies was granted summary judgment, and the facts are not in dispute for the purposes of this appeal. After female workers promoted into the higher-paying hourly jobs, the "Tester" jobs, the union proposed and the company accepted a dual seniority system. This system provided that job promotions and demotions would be controlled by the seniority of a worker in the traditionally male jobs whereas plant seniority continued to control other matters. Accordingly, when the Company reduced its workforce all men who had been assigned to the traditionally male jobs before women were allowed to promote to these jobs would be permitted to retain their jobs longer than all women even if the women had greater plant seniority than all or some of the men. See, Statement of Case.

plaintiff on each occasion when the merged seniority list was applied...." (Emphasis added), Cook v. Pan American World Airways, Inc., 771 F.2d 635, 646 (1985), cert. denied, 106 S. Ct. 895 (1986).[8] Similarly, the Sixth Circuit

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[8] Although Cook is an age discrimination case, the Second Circuit applied the legal principle which it had developed for determining the timeliness of an administrative charge filed pursuant to Title VII. Cook v. Pan American World Airways, Inc., 771 F.2d at 646, quoting, Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 274 (1981), cert. denied, 455 U.S. 988 (1982).

This Court has applied the same interpretation to filing requirements under the ADEA and Title VII because Congress modeled the filing requirement in the ADEA after the Title VII requirement, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 n.11 (1982), because "the ADEA and Title VII share a common purpose," and because of the closely identical language in the two statutes. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). See also, Bruno v. Western Electric Co., 829 F.2d 957, 960 n.1 (10th Cir. 1987) ("[T]he application of the continuing violation theory [is] the same for ADEA and Title VII cases....")

held "that the adoption of a seniority system ... constitutes a continuing violation of the ADEA as long as that system is maintained [and] plaintiffs' cause of action accrued at the time of [their] la[y]off...." Morelock v. NCR Corp., 586 F.2d 1096, 1103 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979).

The Fourth Circuit ruled that there are "truly 'continuing' violations of Title VII" where the plaintiffs charged that the seniority system "constitute[d] an existing violation" which "involve[d] a continuing pattern or practice of discrimination that locked black and women employees into less favorable job positions." (Emphasis in original) Patterson v. American Tobacco Co., 634 F.2d 744, 751 (1980), vacated on other grounds, 456 U.S. 63 (1982).[9]

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[9] The Supreme Court reversed the Fourth Circuit's decision that a seniority system adopted after the

Accordingly, the Patterson claims were "not barred by [the plaintiffs'] failure to have challenged at its inception the policy which gave continuing rise to [the claims]." Id.

The Lorance plaintiffs were barred from challenging the illegal dual seniority system even though they filed administrative charges within 300 days from their job demotions. In conflict with the Second, Fourth, and Sixth

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effective date of Title VII was unlawful simply because the system adversely affected blacks or women even if the system were bona fide, as defined in § 703(h). American Tobacco Co. v. Patterson, 456 U.S. 63, 77 (1982). The Court did not review the Fourth Circuit's ruling that an illegal seniority system constitutes a continuing violation. The Fourth Circuit has continued to hold that a plaintiff may seek relief from an unlawful practice even though she did not file a charge within 180 days of its first occurrence as long as the plaintiff filed within 180 days of the last occurrence. Taylor v. Home Insurance Company, 777 F.2d 849, 856 (1985), cert. denied, 106 S. Ct. 2249 (1986); Crosland v. Charlotte Eye, Ear and Throat Hospital, 686 F.2d 208, 212 (1982).

Circuits, the Seventh Circuit ruled that the plaintiffs were forever barred from challenging the seniority system when they failed to file a charge within 300 days of the date when they became subject to the system.

In addition to the three circuits which determined that the application of discriminatory seniority systems is a continuing violation, the Third Circuit, in a situation closely related to a collectively bargained for seniority system, held that a violation occurs on each application of a discriminatory provision in a collective bargaining agreement which prevented employees eligible for early retirement from receiving layoff benefits. EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 219 (1983), cert. denied, 469 U.S. 820 (1984). In Lorance, the Seventh Circuit holds that each application of a

discriminatory contract provision does not create a present violation, whereas the Third Circuit holds to the contrary.[10]

Furthermore, the First Circuit

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[10] Two circuits have held that each application of a practice not contained in a collective bargaining agreement constitutes a new violation of Title VII. The District of Columbia Circuit ruled that each use by the Army of an evaluation report which was discriminatorily prepared constituted a new violation even though the evaluation was prepared outside of the filing period. Stoller v. Marsh, 682 F.2d 971, 978-79 (1982), cert. denied, 460 U.S. 1037 (1983). The Seventh Circuit ruling that the use of a discriminatory seniority rating for Lorance by the Company does not establish a present violation is inconsistent with the Stoller ruling that the use of a discriminatory supervisory rating does establish a present violation. See also, Valentino v. United States Postal Service, 674 F.2d 56, 65 (D.C. Cir. 1982); McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982). In agreement with Stoller, the Fifth Circuit ruled that an injured worker may sue after each application of a discriminatory policy (in this instance the exclusion of Jewish physicians from serving in a program in Saudi Arabia), Abrams v. Baylor College of Medicine, 305 F.2d 528, 534 (1986).

recently specifically rejected the Seventh Circuit's decision in Lorance and approved the Third Circuit's decision in Westinghouse Electric Corp. Johnson v. General Electric, No. 87-1752, slip op. at 7-8 (February 22, 1988). The First Circuit concluded that the decision in Lorance is "unreasonable, as well as undesirable from a public policy perspective." Id. at 9.

The conflict between the Seventh Circuit and the Third, Fifth and Sixth Circuits is particularly severe. These circuits hold that "the mere existence" of a discriminatory policy is an insufficient basis for a cause of action. Abrams v. Baylor College of Medicine, 805 F.2d at 533. An employee's cause of action "does not accrue until [the worker's] employment opportunities are adversely affected by the application" of a discriminatory seniority system,

Morelock v. NCR Corp., 586 F.2d at 1103, or of a discriminatory collective bargaining agreement, EEOC v. Westinghouse Electric Corp., 725 F.2d at 219; contra, Domingo v. New England Fish Co., 727 F.2d 1429, 1443, modified, 742 F.2d 520 (9th Cir. 1984).[11] See also, Johnson v. General Electric, slip op. at 10 ("[I]t is questionable whether an action by an employee who has not yet suffered any injury as a result of a discriminatory system is sufficiently

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[11] The Fifth Circuit recognizes that "courts have differed over whether the existence of the policy itself constitutes a continuing violation, making a suit timely if the policy remains in effect during the actionable period, or whether there must be some actual application of it to the plaintiff within the period." Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 979 (1983), cert. denied, 107 S. Ct. 232 (1986). However, this Court has stated that the mere adoption of a discriminatory "seniority system which has not been applied would not give rise to a cause of action." American Tobacco Co. v. Patterson, 456 U.S. at 69. See, section II, infra.

ripe.") Thus, the Third, Fifth, and Sixth Circuits would dismiss as premature a cause of action based upon an administrative charge filed at the time required (when the worker first became subject to a discriminatory policy) by the Seventh Circuit, whereas the Seventh Circuit would often dismiss a cause of action as based upon an untimely filing of a charge which was made on the only occasion (the actual application of a discriminatory policy) permitted by the Third, Fifth, and Sixth Circuits.

The severity of the conflict among the circuits[12] not only leads to starkly

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[12] In addition to the direct conflicts with the five circuits set forth above, the Seventh Circuit's analysis in Lorance conflicts with three additional circuits which have ruled that a general discriminatory pattern may establish a continuing violation which would permit the plaintiff to recover for acts which occurred before the filing period. The Tenth Circuit ruled that "[a] claim of age discrimination ... may be based on a continuing policy and practice of discrimination that began

different judicial results but also makes impossible the consistent and fair implementation by the Equal Employment Opportunity Commission of an administrative process which annually receives approximately 70,000 charges of

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before the statutory filing period, as long as the employer continues to apply the discriminatory policy ... to a point within the relevant filing period.... Discriminatory acts occurring before the filing periods ... are used by the courts to fashion a remedy and determine damages." Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1543 (1987); see also, Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924-25 (9th Cir.), cert. denied, 459 U.S. 971 (1982); Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 759-60 (9th Cir. 1980); Satz v. ITT Financial Corp., 619 F.2d 738, 743-44 (8th Cir. 1980).

Thus, the Tenth Circuit determined that relief may be provided to plaintiffs at an AT&T Technologies plant in Colorado who suffered discriminatory denial of promotions to supervisory positions based upon a general policy of discrimination established prior to the filing period, Furr v. AT&T Technologies, Inc., while the Seventh Circuit denied relief to women at the AT&T Technologies plant in Illinois who suffered discriminatory job demotions based upon a policy established before but implemented during the filing period.

discrimination. See, Equal Employment Opportunity Commission, 19th Annual Report at 18.

The conflict between the Seventh Circuit and the neighboring Eighth and Sixth Circuits imposes upon the EEOC district offices in Milwaukee, which has jurisdiction for States within the Seventh (Wisconsin) and the Eighth Circuits (Minnesota and Iowa), and in Indianapolis, which has jurisdiction for States within the Sixth (Kentucky) and Seventh Circuits (Indiana), the difficult task of treating identical charges differently depending upon the State in which the party alleging discrimination works.[13] This confusing task is compounded by the significant number of

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[13] See, EEOC Directives Transmittal, Number 120.001, November 12, 1987 (defines the geographical area supervised by each EEOC office). A copy of this Transmittal has been lodged with the Court.

charges of discrimination received annually by the Milwaukee and Indianapolis offices.[14]

In order to provide guidance for its staff the EEOC has prepared an Interpretive Manual. Bureau of National Affairs, EEOC Compliance Manual at Volume 2. Contrary to the Seventh Circuit, the EEOC Manual concludes that the operation of an illegal practice, such as a seniority system, is a present violation of Title VII.[15] The Lorance decision requires the EEOC, the Federal agency charged with enforcing Title VII, to disregard its interpretation of the law for Illinois, Wisconsin, and Indiana

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[14] In Fiscal Year 1984 there were 4,764 charges filed from the States covered by the Milwaukee office and 5,225 charges from the States covered by the Indianapolis office. Equal Employment Opportunity Commission, 19th Annual Report at 20-21. (This is the most recent Report prepared by the EEOC).

[15] See, BNA EEOC Compliance Manual at Volume 2, §§ 605.6, 605.7(a), 616.14(b).

while implementing its interpretation of the law for the neighboring States.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S STANDARD AS TO WHETHER THE OPERATION OF A DISCRIMINATORY PRACTICE CAUSES AN ACTIONABLE WRONG AND RAISES AN IMPORTANT QUESTION AS TO THE APPLICATION OF FAIR EMPLOYMENT LAW.

This Court ruled that "[e]ach week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." Bazemore v. Friday, 106 S. Ct. at 3006-07. As each application of the pay practice in Bazemore was "a wrong actionable under Title VII," so is each application of the discriminatory seniority practice in Lorance.

The Seventh Circuit refuses to hold that the application of a discriminatory seniority system is an act of discrimination because "employees could

challenge a seniority system indefinitely," and relying upon Delaware State College v. Ricks, 449 U.S. 250 (1982), because such a ruling "would run counter to the strong policy favoring the prompt resolution of discrimination disputes." App. 8a.

The Court has already rejected the position of the Seventh Circuit by holding that Title VII "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977).[16] Moreover, the

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[16] In United Air Lines the plaintiff was forced to resign because the company refused to employ pregnant stewardesses. After rehire, Evans challenged the failure of the company to count her seniority from her prior employment. Unlike Lorance, Evans did not complain that the seniority system was illegal but merely that the system perpetuated the effects of the illegal policy of forced termination which the company no longer applied.

Teamsters decision compels the conclusion that each application of a discriminatory seniority system violates Title VII. The Court held that an "otherwise neutral, legitimate seniority system" does not violate Title VII "simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54. However, if the system had its "genesis in ... discrimination" or "was negotiated" with an "illegal purpose" then the system's perpetuation of discrimination is unlawful. 431 U.S. at 356.[17] The Seventh Circuit's ruling prevents Lorance from establishing

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[17] Also this Court has concluded that "'[a]bsent a discriminatory purpose, the operation of a seniority rule cannot be an unlawful employment practice even if the system has some discriminatory consequences.' Thus, any challenge to a seniority system and Title VII will require a trial on the issue of discriminatory intent...." Pullman-Standard v. Swint, 456 U.S. 273, 277 (1982). Absent discriminatory purpose, the operation of a seniority system is not illegal, but with discriminatory purpose, the operation of the system violates Title VII.

pursuant to the reasoning in Teamsters that her job demotion was illegal because it was caused by a seniority system which was created and negotiated with an intent to advantage male workers over female workers.

Furthermore, the Supreme Court has determined that "[t]he adoption of a seniority system which has not been applied would not give rise to a cause of action." American Tobacco Co. v. Patterson, 456 U.S. at 69. The "discriminatory effect arise[s] only when the system is put into operation...." Id. In California Brewers Association v. Bryant, 444 U.S. 598, 602, 610-11 (1980), the Supreme Court remanded the issue of whether the operation of a facially neutral seniority rule adopted more than 10 years prior to the filing of the complaint was bona fide and lawful. See also, Nashville Gas Co. v. Satty, 434

U.S. 136, 139 (1977).[18] The Seventh Circuit takes the untenable position requiring Lorance to file a charge before the operation of the discriminatory seniority system injures her even though this Court indicated that the mere existence of a discriminatory system does not give rise to a cause of action and even though in Satty and Bryant the Court implicitly determined that the operation of a long-established discriminatory seniority system is a present illegal act.

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18 In Satty the Supreme Court ruled illegal the Company's seniority system provision denying accumulated seniority to female employees returning to work following pregnancy leave. Although hired in 1969 and subject to the system for four years, the plaintiff did not challenge the system until 1973 when she was denied accumulated seniority after she returned to work after childbirth. The Court held that the seniority practice violated Title VII. Under the Lorance decision, Satty's claim would have been dismissed as untimely since she did not file a charge within 300 days of becoming subject to the seniority system.

Also, the Seventh Circuit's reliance upon Delaware State College v. Ricks, supra, is misplaced. Ricks complained that he was discriminatorily denied tenure and that he continued to suffer injury while he worked pursuant to a one-year termination contract. In rejecting Ricks' argument, the Court concluded that the "termination of employment ... is a delayed but inevitable, consequence of the denial of tenure.... [T]he only alleged discrimination occurred -- and the filing limitations periods therefore commenced -- at the time the tenure decision was made...." 449 U.S. at 257-58. Unlike the pay practice in Bazemore and the seniority system in Lorance, no current discriminatory practice was alleged in Ricks.[19]

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19 The Ricks and Evans decisions that single discriminatory acts do not constitute continuing violations merely because those acts have continuing consequences are not remarkable. These

Under the Fair Housing Act of

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decisions are no different from the application of a limitation period to an accident case. Although the victim of an automobile accident may suffer from his injuries for the remainder of his life, the statute of limitations runs from the date of the accident.

On the other hand, this Court has long held that an illegal continuing practice creates a new violation whenever the practice causes injury. An illegal system for distributing shoe machinery which commenced in 1912 was subject to a timely suit in 1955 although damages were restricted by the applicable statute of limitations. Hanover Shoe, Inc. v. United Shoe Machinery, Inc., 392 U.S. 481, 502, n.15 (1968); see also, Zenith Radio Corp. v. Hazeltime Research, 401 U.S. 321, 338-39 (1971) (continuing conspiracy to restrain trade); Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) (continuing illegal pay scales). An illegal continuing seniority system, like an illegal pay system, monopoly, or a practice in restraint of trade, violates the law whenever it causes injury. See Laycock, Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues, 49 Law and Contemp. Probs. 53 (1986).

1968,[20] a civil rights statute closely similar in purpose and design to Title VII, the Court has distinguished between a discrete act of discrimination and a continuing practice of discrimination in applying the limitations period. If there is a continuing practice of racial steering, a court may remedy instances of discriminatory steering which occurred prior to the 180-day period for filing an administrative charge so long as at least one application of the steering practice occurred within the filing period. Where there is a continuing practice, not only does "the staleness concern [of statutes of limitations] disappear[ ]," but also a "wooden application" of the limitations period "undermines the broad remedial

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[20] The Fair Housing Act provision, 42 U.S.C. § 3612(a), which requires the filing of an administrative charge within 180 days of the discriminatory act, "is comparable to the one imposed by the Age Act [and by Title VII]." Taylor v. Home Insurance Company, 777 F.2d at 856.

intent of Congress embodied in the Act...." Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982).

This Court has established a similar "guiding principle" for interpreting Title VII limitations provisions. "[A] technical reading [of those provisions] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" Zipes v. Trans World Airlines, Inc., 455 U.S. at 397, quoting, Love v. Pullman Co., 404 U.S. 522, 527 (1972). Just as the Court has defined the application of a racial steering policy as a continuing violation of fair-housing law, so should the Court define the application of a gender-motivated seniority policy as a continuing violation of fair employment law.

The Lorance rule is particularly unfair since it requires a worker to

bring suit whenever there is an arguably discriminatory standard[21] imposed even though it has not been applied. As in Lorance, a changed seniority system might eventually result in a worker being "bumped" to a lower-paying job. But then again as a result of any number of possible occurrences, such as a change in the system, a worker's promotion to a supervisory position not covered by the

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[21] The Lorance rule might apply to the imposition of any discriminatory practice. For example, a company may establish an educational requirement for promotion which is unlawful because it disqualifies disproportionately more blacks than whites and it is not "job related." Cf., Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under Lorance, an employee must sue when the policy is imposed or forfeit his or her Title VII rights. However, absent the confrontational Lorance rule, an employee might decide to attempt to achieve the required educational degree and thereby qualify prior to the next promotional opportunity. Rather than encouraging accommodation, the Lorance rule requires the worker to confront the company's policy even before it is applied, before the worker is harmed, and even though the worker may never be harmed by the new practice.

seniority system or transfer to another department, the newly imposed discriminatory system may never apply to a particular worker. A worker may reasonably decide that it is better not to tilt at hypothetical windmills.

It is counter-productive to any sensible attempt to limit litigation to require, as the Seventh Circuit did in Lorance, workers to sue before they have been harmed and even though they may never be harmed simply because a potentially discriminatory employment standard has been imposed. As the First Circuit recently concluded in rejecting the Lorance decision, "[i]t is unwise to encourage lawsuits before the injuries resulting from violations are delineated, or before it is even certain that injuries will occur at all." Johnson v. General Electric, slip op. at 10. It is especially inappropriate to require

premature and possibly unnecessary litigation about the hypothetical application of a newly imposed practice since Congress established "[c]ooperation and voluntary compliance ... as the preferred means for achieving [Title VII's] goals." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

Moreover, the Seventh Circuit fails to accomplish its purported goal of encouraging prompt litigation over newly established practices. Since female workers who promote into the Tester position in the future may sue, the system may be challenged for years after its adoption. The Seventh Circuit takes the untenable position that workers who are demoted on the same day as a result of the same application of the discriminatory system have different Title VII rights. A female worker who promoted to the Tester position within

300 days of the demotion may sue, while a worker who promoted more than 300 days before the demotion has forfeited her Title VII rights.

The Lorance-engendered conflict regarding the application of Title VII to seniority systems is especially important because "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation." Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976);[22] see also, Trans World Airlines,

[22] In a recent survey of 400 major collective bargaining agreements, the Bureau of National Affairs determined that 90 percent of the contracts contained seniority provisions. 2 Collective Bargaining Negotiations and Cont. (BNA) at 75:1 (April 4, 1986). In its most recent comprehensive study of collective bargaining agreements, which was undertaken in 1972, the Bureau of Labor Statistics surveyed the 1974 major collective bargaining agreements which covered 8.2 million workers. Of the 1974 agreements, 1501 agreements covering 6.1 million workers contained seniority

Inc. v. Hardison, 432 U.S. 63, 79 (1977). Congress and this Court have recognized that "on occasion" the purpose of Title VII to eliminate discrimination would "conflict with policy favoring minimal supervision by courts" of collective bargaining agreements and the seniority provisions which "are of 'overriding importance' in collective bargaining agreements" American Tobacco Co. v. Patterson, 456 U.S. at 76-77. Accordingly, on at least eight occasions,[23] this Court has reviewed the appropriate application of the fair employment laws to seniority systems. It

provisions. Bureau of Labor Statistics, U.S. Dept. of Labor Bull. No. 1425-11, Administration of Seniority at 2 (1972).

[23] Franks v. Bowman Transportation Co., supra; Teamsters v. United States, supra; United Air Lines v. Evans, supra; Trans World Airlines, Inc. v. Hardison, supra; California Brewers Association v. Bryant, supra; Zipes v. Trans World Airlines, Inc., supra; American Tobacco Co. v. Patterson, supra; Pullman-Standard Co. v. Swint, supra.

is now time for the Court to resolve the important issue regarding the application of the Title VII procedural requirements for filing charges alleging that a seniority system or a similar continuing policy is illegal.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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February 26, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 30, 1987.

Before

Hon. William J. Bauer, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

PATRICIA A. LORANCE, JANICE M. KING, and CAROL S. BUESCHEN, Plaintiffs-Appellants,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86-2584 vs.	)
AT&T TECHNOLOGIES, INC., and LOCAL 1942 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Defendants-Appellees.	) No. 83 C 6602 Harry D. Leinenweber, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a

rehearing en banc.* A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Circuit Judges Cudahy, Easterbrook, and Ripple voted to grant rehearing en banc.

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2584

PATRICIA A. LORANCE, JANICE M. KING, and CAROL S. BUESCHEN,

Plaintiffs-Appellants,

v.

AT&T TECHNOLOGIES, INC. and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 6602—**Harry D. Leinenweber,** *Judge.*

ARGUED APRIL 24, 1987—DECIDED AUGUST 19, 1987

Before BAUER, *Chief Judge,* and CUDAHY and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* The plaintiffs are female hourly wage workers employed by AT&T Technologies. Between 1978 and 1980, the plaintiffs were required to surrender their plant-wide seniority in order to be promoted to the position of "tester," a comparatively high-paying job which had customarily been held by men. In 1982, AT&T reduced its employment force. In carrying out its reductions, AT&T considered only the seniority that the plaintiffs had accrued during the time that they had been testers. As

a result, AT&T demoted the plaintiffs to less desirable positions. The plaintiffs subsequently filed this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17 (1982), alleging that their demotions constituted illegal discrimination based on sex. The district court granted summary judgment for the defendants on the ground that the plaintiffs' claims were untimely. We affirm.

I.

The plaintiffs, Patricia A. Lorance, Janice M. King, and Carol S. Bueschen, are hourly wage employees of the defendant employer, AT&T Technologies, and are members of the defendant union, Local 1942. Lorance and Bueschen have been employed at AT&T's Montgomery Works facility in Aurora, Illinois since 1970. King began work at that facility in 1971. At the time the plaintiffs began their employment at Montgomery Works, seniority was calculated on a plant-wide basis. Promotions and demotions within the hourly wage jobs at the facility were based on plant-wide seniority.

Among the hourly wage jobs at Montgomery Works is a category of jobs collectively known as the "tester universe." These positions are among the highest-paying hourly wage jobs at the facility. Although these positions traditionally had been filled by men, by 1978 an increasing number of women had used their plant-wide seniority to obtain jobs as testers. In late 1978, the plaintiffs' union entered into discussions with AT&T concerning the seniority rules governing the tester positions. The employer and the union ultimately developed a proposal, known as the "Tester Concept." Under this plan, once an employee became a tester, promotions and demotions were to be based on the length of time that the employee had been a tester ("tester seniority"), rather than on the length of time the employee had been at the Montgomery Works facility.

The Tester Concept was extensively discussed at a series of union meetings. On June 28, 1978, the union held a special meeting to vote on the Tester Concept. The plan was approved by a margin of ninety votes to sixty—approximately the ratio of men to women. All three plaintiffs attended the meeting, and voted against the plan. On July 23, 1979, the union and the employer entered into a letter of agreement adopting the Tester Concept.

At the time the Tester Concept was adopted, Lorance was employed as a tester. King was promoted to a tester position in February, 1980. Bueschen obtained a tester job in November, 1980. By the summer of 1982, Lorance and King had been promoted to senior tester positions. At that time, AT&T began a reduction in force, which it conducted in accordance with the terms of the collective bargaining agreement. Based on their tester seniority, Lorance and King were demoted to lower-paying, more junior tester positions. Bueschen was demoted to a non-tester job. The plaintiffs allege that they would not have been demoted had the decision been based on plant-wide seniority.

On April 13, 1983, Lorance and Bueschen filed complaints with the Equal Employment Opportunity Commission. King filed a complaint with the Commission eight days later. After obtaining right-to-sue letters, the plaintiffs brought this action on September 30, 1983. The plaintiffs alleged that their demotions violated Title VII. They also sought certification of a class consisting of all women employees at the Montgomery Works facility who either were testers and had lost their plant-wide seniority, or who had been deterred from becoming testers because of the requirement that they give up their plant seniority. The defendants moved for summary judgment on the ground that the plaintiffs' suit was time-barred. The district court granted the defendants' motion, holding that the limitations period had begun at the time they knew or should

have known that they had lost their plant-wide seniority. The plaintiffs then brought this appeal.[1]

II.

Title VII claims brought in Illinois are generally subject to a 300-day period of limitation. *See* 42 U.S.C. § 2000e-5(e) (1982).[2] In order to satisfy the timeliness requirement, a plaintiff must allege that a specific action taken by the defendant during the preceding 300 days violated Title VII. *See Nazaire v. Trans World Airlines*, 807 F.2d 1372, 1376 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1979 (1987). A claim is not timely if it merely asserts that a discriminatory act that occurred prior to the limitations period had an effect that occurred during the limitations period. *See id.*

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[1] The district court granted summary judgment without first considering the plaintiffs' motion for class certification. This is a violation of Federal Rule of Civil Procedure 23, which requires the district court to decide the question of class certification "as soon as practicable," Fed. R. Civ. P. 23(c)(1). Although a district court's deliberate decision not to certify a class deprives us of appellate jurisdiction, *Glidden v. Chromalloy American Corporation*, 808 F.2d 621 (7th Cir. 1986), we are not deprived of jurisdiction in a case, such as the present one, in which the district court inadvertently does not act on the certification motion, *see Bennett v. Tucker*, No. 86-2628, slip op. at 5-6 (7th Cir. Aug. 11, 1987). Nonetheless, this case illustrates the problem that may arise when a court does not comply with Rule 23. Because the district court did not decide the class certification motion, we do not know who is bound by our judgment. This may raise a significant res judicata problem in any future litigation that may arise out of the defendants' administration of the tester seniority system.

[2] The 300-day limitations period is based on the fact that Illinois has a state agency to which employment discrimination complaints may be referred. In states that do not have their own agencies, the deadline is only 180 days. *See* 42 U.S.C. § 2000e-5(e) (1982). The defendants argue that because the plaintiffs did not make use of the existing state procedures, the 180-day period applies. However, we need not resolve this question, because the plaintiffs' claims are untimely under either standard.

Determining whether a plaintiff is challenging an act of discrimination, rather than the effects of a prior act of discrimination, is especially important when seniority systems are involved. This is because a seniority system may perpetuate the effects of a past act of discrimination. For example, in *United Airlines v. Evans*, 431 U.S. 553 (1977), the defendant fired the plaintiff for a discriminatory reason, but later rehired her. However, the defendant did not give the plaintiff seniority credit for the four-year period during which she had been out of work. As a result, the plaintiff was at a competitive disadvantage in obtaining seniority-based benefits, such as wage increases and promotions. The plaintiff filed suit, alleging that the employer was violating Title VII. The Supreme Court noted that the plaintiff's firing had been an act of discrimination, which the plaintiff could have contested within the limitations period. However, the Court went on to hold that the disadvantages that the employee incurred because of her loss of seniority were merely the effect of the prior discriminatory firing. *See id.* at 558.

The plaintiffs in this case argue that their demotions constituted acts of discrimination. They recognize that, under *Evans*, the fact that a seniority system perpetuates the effect of prior discrimination does not constitute an act of discrimination. However, they argue that *Evans* does not apply in this case, because AT&T and Local 1942 allegedly adopted the seniority system for the very purpose of discriminating. The plaintiffs contend that the continued application of any intentionally discriminatory seniority system constitutes a continuing violation of Title VII. *See Patterson v. American Tobacco Company*, 634 F.2d 744, 750-51 (4th Cir. 1980), *vacated on other grounds*, 456 U.S. 63 (1982); *cf. Morelock v. NCR*, 586 F.2d 1096, 1102-03 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (operation of discriminatory seniority system constitutes ongoing violation under ADEA). Therefore, they reason, each action taken pursuant to the seniority system that disadvantages an employee constitutes an act of discrimination.

Although the plaintiffs' argument is logically appealing, we are compelled to reject it. If we were to hold that each application of an allegedly discriminatory seniority system constituted an act of discrimination, employees could challenge a seniority system indefinitely. This would run counter to the strong policy favoring the prompt resolution of discrimination disputes. *See Delaware State College v. Ricks*, 449 U.S. 250, 259-60 (1980). This policy is especially important where seniority systems are involved. If a court finds that a seniority system was adopted for a discriminatory purpose, it may be obligated to order drastic restructuring of the system. *See, e.g., Teamsters v. United States*, 431 U.S. 324, 371-77 (1977). The longer a plaintiff delays, the more difficult it becomes for a court to craft relief that strikes the critical balance between eradicating existing discrimination and protecting the rights of all employees. Accordingly, we cannot accept the plaintiffs' suggestion that any adverse action taken pursuant to an allegedly discriminatory seniority system constitutes an act of discrimination.

The defendants argue that their adoption of the Tester Concept constituted the relevant act that triggered the period of limitations. However, we must also reject this position. At the time the defendants adopted the Tester Concept, neither King nor Bueschen were testers. We can see no reason why they should have been required to contest a seniority system that did not apply to them. Requiring employees to contest any seniority system that might some day apply to them would encourage needless litigation. Moreover, viewing the adoption of a discriminatory seniority system as the act of discrimination that triggers the limitations period would frustrate the remedial policies that are the foundation of Title VII. Under this approach, any seniority system would be immune to challenge 300 days after its adoption. Future employees would therefore have no recourse when confronted with an existing seniority system that they believe to be discriminatory.

We believe that it is essential to strike a balance that reflects both the importance of eliminating existing discrimination, and the need to insure that claims are filed as promptly as possible. We therefore conclude that the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially-neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory. We emphasize that our holding is a narrow one. We recognize that an act of discrimination may occur when an employer acts pursuant to a seniority system that is facially discriminatory. *See Bartmess v. Drewrys, U.S.A.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). A violation may also occur where an employer uses any discretion that it may have under a collective bargaining agreement in a discriminatory manner. *See generally Stewart v. CPC International*, 679 F.2d 117, 120-21 (7th Cir. 1982) (*per curiam*) (discussing various "continuing violation" theories).

In this case, the employer complied fully with the facially-neutral seniority system. Although the plaintiffs were aware of the potentially discriminatory impact of this system at the time they became subject to it,[3] they did not file charges with the EEOC for periods ranging from two-and-a-half to five years after AT&T's allegedly discriminatory act. This is well beyond the 300-day maximum that Title VII requires. Accordingly, we must conclude that the plaintiffs' claims are time-barred. The decision of the district court is, therefore, AFFIRMED.

[3] On appeal, the plaintiffs suggest that a genuine issue of material fact exists as to when they became aware that they had lost their plant-wide seniority. However, the affidavits that the plaintiffs submitted to the district court conclusively prove that the plaintiffs were aware that they had forfeited their plant-wide seniority on the day they became subject to the Tester Concept.

CUDAHY, *Circuit Judge*, dissenting:

I am wholly in sympathy with the majority's objective of obtaining a prompt resolution of challenges to seniority systems. This is consistent with the Supreme Court's policy concerns in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Unfortunately, I do not believe the majority's result here furthers this objective. There are almost certain to be other members of the class who are not barred by the statute of limitations and who can bring challenges to tester seniority in the future. Perhaps this is why the defendants have not argued in support of the result reached by the district court and affirmed here; the defendants have argued instead for the date of adoption of the seniority plan as triggering the statute of limitations—an outcome that would effectively immunize the seniority system from future challenges.

The plaintiffs have alleged that the seniority system in question was discriminatory in purpose and effect. The mere fact that it was not *facially* discriminatory does not seem to me relevant for purposes of the statute of limitations. *See Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). The plaintiffs filed complaints at the time they were injured (by demotion) in the way the defendants allegedly intended them to be injured. Viewed in that direct and uncluttered fashion, their complaints were timely.

The majority says that the plaintiffs are too late because they knew earlier that they had become subject to the allegedly discriminatory system. At this earlier time, however, they had not really been injured and might never be injured. The majority's rule, therefore, may encourage premature lawsuits.

Cases such as *Evans, supra*, on which the majority relies, did not involve seniority systems that were themselves alleged to be discriminatory. In *Evans*, the seniority system merely magnified the impacts of other acts alleged to be discriminatory.

Therefore, although I think the majority's policy concerns are important, they find dubious application in the result here, and I therefore respectfully dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA A. LORANCE, JANICE M. KING and CAROL S. BUESCHEN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	NO. 83 C 6602
v.	)	JUDGE LEINENWEBER
AT&T TECHNOLOGIES, INC. and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs, Patricia A. Lorance ("Lorance"), Janice M. King ("King"), and Carol S. Bueschen ("Bueschen"), bring this suit individually and on behalf of all other similarly situated women against defendants, AT&T Technologies,

Inc. ("AT&T")[1] and Local 1942, International Brotherhood of Electrical Workers, AFL-CIO. This action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., and seeks to redress and enjoin unlawful discrimination against women employees.

Defendant AT&T has moved for summary judgment on the ground that the plaintiffs' first amended complaint is time-barred under Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e). The motion was briefed by the parties and was referred to the magistrate for a report and recommendation. The magistrate recommended that the court grant defendant's motion for summary judgment.

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[1] This case was originally styled "Georgia Gonzales v. Western Electric Co., Inc." Gonzales was voluntarily dismissed form the action. Since January 1, 1984, Western Electric Company, Inc. has been known as AT&T Technologies, Inc. and the pleadings were amended to reflect the name change.

Plaintiffs filed objections to the report and recommendation and defendant has responded to plaintiffs' objections. The motion is now ripe for decision. For the reasons stated herein, the court declines to adopt the magistrate's report but grants defendant's motion for summary judgment on alternative grounds.

BACKGROUND[2]

Plaintiffs, Patricia A. Lorance, Janice M. King and Carol S. Bueschen are hourly-rated employees of defendant AT&T's Montgomery Works facility in Aurora, Illinois. The facility manufactures data sets, circuit packs, printed wiring boards and electrical components. Montgomery Works' employees fall into several categories, one of which is hourly-rated graded personnel.

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[2] The background facts were set forth at pp.2-5 of the magistrate's report and are repeated here for discussion purposes.

Hourly wage rates are based on job grades so that higher rates attach to the higher-graded jobs. The majority of the hourly-rated graded jobs are semi-skilled positions. Plaintiffs contend that these semi-skilled positions have been traditionally filled by women employees.

Within the hourly-rated graded job category are jobs called "tester" positions that are collectively known as the "tester universe." Plaintiffs allege that the tester positions traditionally have been viewed as men's jobs. Moreover, plaintiffs claim that tester positions were filled either by promoting the few men that were located in the lower-graded, non-tester jobs or by hiring men from outside the plant. In 1970, women began to infiltrate the "tester universe" and become "testers."

Plaintiffs allege that in 1979 AT&T and the union conspired to manipulate the

seniority system then in effect at Montgomery Works by implementing a system known as the "Tester Concept" in order to protect male testers from women having greater plant seniority and to discourage women from seeking entry into the tester universe. Prior to 1979, all hourly inter-grade promotions and displacements at Montgomery Works were made on the basis of plan[illegible]rity. Under the Tester Concept, all new entrants, male or female, into the tester universe were assigned dual seniority dates. The date of entry to the tester universe governed all upward and downward job movement within the tester universe, and plant seniority governed all other matters.

The Tester Concept originated with the union in late 1978 or early 1979. The concept was heatly debated in several union meetings and was passed on June 28, 1979 by a hand vote of 90 to 60,

reflecting the approximate proportions of men and women in attendance. On July 23, 1979, the union and AT&T entered into a letter of understanding which made the Tester Concept plant policy. This agreement was incorporated into the master contract between AT&T and the union in August, 1980.

On November 15, 1982, plaintiff Lorance, while working as a tester, was downgraded as part of the company's reduction in force policies. Plaintiff King was downgraded on August 23, 1982 and plaintiff Bueschen was downgraded first on November 15, 1982 and then again, on January 23, 1984. All three plaintiffs allege that they would not have been downgraded if they could have retained their plant seniority when they became testers. In addition, plaintiffs claim that they were denied promotions to which they were entitled as a result of

defendant's manipulation of the seniority rules.

On April 13, 1983, plaintiffs Lorance and Bueschen filed charges with the Equal Employment Opportunity Commission ("EEOC") claiming that they were discriminated against on the basis of their sex. Plaintiff King filed her charges with the EEOC on April 21, 1983. On June 24, 1983, the EEOC issued to plaintiffs Notices of Right to Sue AT&T, and less than 90 days later, on September 20, 1983, plaintiffs filed their pro se complaint. Plaintiffs then retained counsel and filed their first amended complaint on February 14, 1984. The amended complaint named the union as an additional defendant and charged both defendants with discrimination on the basis of sex.

DISCUSSION

A prerequisite to commencement of a

Title VII action is the timely filing of a charge of discrimination with the EEOC, 42 U.S.C. 2000e(f). "A charge is timely if it is filed within 180 days of the alleged act of discrimination, except in states that, like Illinois, have their own agencies for investigating complaints of employment discrimination. In these states, known as 'deferral' states, the filing is expanded to 300 days.[3] 42

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[3] The issue of whether a complainant in a deferral state is entitled to 300 days if he or she elects not to take advantage of the state agency has not been decided by the Seventh Circuit or this court. As noted in Sere, however, several judges in this district have held that a plaintiff who fails to take advantage of the state agency should not be permitted to take advantage of the 300 day filing period. Proffit v. Keycom Electronic Publishing, No. 85 C 3299, slip op. at 12-16 (N.D. Ill. Dec. 11, 1985) (dictum); O'Young v. Hobart Corp., 579 F. Supp. 418, 421 (N.D. Ill. 1983); Lowell v. Glidden-Durkee, Div. SCM Corp., 529 F. Supp. 17 (N.D., Ill. 1981); Contra Flagg v. Atchison, Topeka & Santa Fe R.R. Co., No. 84 C 10972, slip op. (N.D. Ill. Dec. 18, 1985). The court specifically declines to rule on this point because it is not determinative in the instant case. See, infra, n.6. The court will refer to

U.S.C. 2000e-5(e)." Sere v. Board of Trustees, No. 85 C 7899, slip op. (N.D. Ill. February 28, 1986).

Defendant asserts that plaintiffs' claims are not timely because the discriminatory act complained of, the implementation of the "Tester Concept", occurred over 180 days prior to the 1983 filing of plaintiffs' EEOC charges. Plaintiffs argue that continued enforcement of a discriminatory seniority system is an ongoing violation of Title VII that can be challenged at any time under the "continuing violation" theory.

The magistrate rejected plaintiffs' argument and held that the use of a facially neutral seniority system is not a continuing violation of Title VII. He recommended that the court grant defendant's motion for summary judgment because plaintiffs failed to file suit

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the 180-day period.

within 180 days of the date the seniority system was adopted or implemented.[4]

The court agrees with the magistrate that the use of a facially neutral seniority system is not ongoing discrimination. However, the court finds that the magistrate's use of the "date of adoption" of the system for purposes of calculating the filing period is problematic. Under Evans v. United Air Lines, 431 U.S. 553 (1977), the relevant date should be the date of impact or the date the plaintiffs knew or should have known that their seniority rights had been affected by the "Tester Concept".

In Evans, the plaintiff was a flight attendant who was terminated in 1968 pursuant to an United Air Lines policy of terminating female flight attendants when they married. The policy was adopted

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[4] The system was incorporated in the 1980 union contract. Plaintiffs' charges were not filed until April, 1983.

prior to June of 1966 and was subsequently found to be discriminatory in Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). United Air Lines abandoned the policy in 1971. Evans was rehired by United Air Lines in 1972 and was classified for seniority purposes as a new employee. She filed suit to establish her entitlement to seniority credit based on her pre-1972 work with United. She argued that United's refusal to credit her with pre-1972 seniority constituted a continuing violation of Title VII. The Supreme Court refused to view United's action as a continuing violation and recognized that while the neutral seniority system did give present effect to a past act of discrimination it did not constitute a present violation of Title VII, 431 U.S. at 558. The court reasoned that a challenge to a neutral system may not be

predicated on the mere fact that a past event, which has "no present legal significance",[5] has affected the calculation of seniority credit even if the past event might have justified a valid claim against the employer. Id. The court was concerned that "a contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Id.

In EEOC v. Illinois Bell Telephone, No. 80 C 2576, slip op. (N.D. Ill. April 1, 1982), the court citing Roberts

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[5] Id. Justice Stevens stated:

"United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by §706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences".

v. North American Rockwell Corp., 650 F.2d 823, 827 (6th Cir. 1981), recognized that defining the legitimate scope of a continuing violation theory after Evans "requires a court to juxtapose a broad remedial reading of Title VII, liberally construing the act to encourage the eradication of discrimination with a narrow interpretation that respects the policy underlying the 180-day limitation period", that is, "to protect employers from the burden of defending claims arising from employment decisions that are long past." See, Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980). The court concluded that to strike this balance it is necessary in every case to determine whether "a present violation" exists or, alternatively, whether the alleged discriminatory acts merely "give present effect to a past act of discrimination."

Plaintiffs argue that they are discriminated on a continual basis due to the fact that they surrendered seniority to become testers. They allege that they have been denied promotions and have been downgraded because of the ongoing use of the "Tester Concept." They contend that a facially neutral seniority system is an ongoing violation of Title VII if it was designed, operated and maintained with the intent to discriminate and can, therefore, be challenged at any time.

The court finds, however, that although plaintiffs' arguments have immediate appeal they must be rejected under Evans and its progeny. In this case, plaintiffs seek to challenge the one-time act of defendant in recalculating their seniority. The gist of their argument is that they are subject to continuous acts of discrimination due to the fact that they

lost valuable seniority credit. The problem with their argument is that under Evans no present violation of Title VII exists. Here, the only alleged discriminatory act was forcing plaintiffs to surrender their plant seniority under the "Tester Concept" to become or remain testers. The resulting denials of promotion and downgradings are present effects of the past discriminatory act of recalculating seniority credit for purposes of promotions or downgradings. If the court allowed plaintiffs' claims to survive the motion to dismiss as untimely, the concerns of the Supreme Court in Evans would be realized; plaintiffs would be able to substitute their claims challenging the mandatory surrender of their plant seniority rights for a claim for seniority credit. Unfortunately, plaintiffs have sat on their rights to challenge the fact that

they were forced to surrender their seniority under the "Tester Concept".

The court does agree with plaintiffs, however, on the issue of the applicable date to commence counting the 180-day period. The magistrate's recommendation is rejected insofar as he suggests that the time period should begin to run from the date the Tester Concept was adopted. Three hypotheticals presented by plaintiffs illustrate the inherent inequities in holding that plaintiffs must file suit within 180 days of the date of adoption or implementation of the "Tester Concept". First, plaintiffs urge the court to consider the effect upon a 25-year old employee of a company's adoption of a policy requiring all employees to retire at age 65. According to the magistrate, plaintiff points out, an employee would have to challenge the policy at age 25 or 26

despite that fact that it may never affect him. Second, plaintiff ponders the effect upon an unmarried woman, with no plans of having children, of a company's policy granting disabled employees' greater benefits that those accorded pregnant employees. Under the magistrate's recommendation, she would have to challenge the policy on the date she learned of it and not when she was denied benefits. Third, plaintiff suggests that under the magistrate's recommendation a low level employee must file a charge of discrimination as soon as he or she learns of a discriminatory policy affecting only higher level employees. Plaintiffs reason that this "awareness of an apparently discriminatory policy which affects any job that he seeks but does not yet hold is enough to trigger the requirement that he file a charge." The hypotheticals

clearly evidence the impracticability of requiring plaintiffs to bring suit within 180 days from the date the policy was adopted.

Moreover, not only is the date of adoption theory impracticable, it is doubtful whether any of these hypothetical plaintiffs would even have standing to sue. 42 U.S.C. 2000e-5(b) requires that a person be "aggrieved" before he or she can file suit. None of the hypothetical persons would appear to qualify as aggrieved persons. The magistrate's recommendation encourages people to bring unripe claims alleging harms that they may never experience. In the instant case, two of the three plaintiffs were not "testers" at the time of the change in seniority systems. Under the magistrate's report these plaintiffs would be required to file suit prior to the time that they became

testers even though their interest or standing at that time was remote or peripheral. Such a result will only clog the already overburdened courts with lawsuits that are not ripe.

The court also finds it significant that the Supreme Court did not require Evans to bring suit within 180 days of the adoption of the discriminatory policy. Rather, the focal date of the Evans decision was the date Evans was discharged. As recognized by the Seventh Circuit in Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), United Air Lines, Inc. employed only unmarried stewardesses as early as June 19, 1966, the date Sprogis was discharged. Evans was employed as a stewardess from November 1966 until February 1968. Under the magistrate's recommendation, Evans should have brought suit within 180 days of the date the

policy was enacted, which was probably prior to her first day of work with United Air Lines, or she should have brought suit when she learned of the policy, which would have been the date she was hired. Obviously, the Supreme Court had little difficulty finding that Evans could have challenged her discharge by filing a timely charge with the EEOC within 180 days from the date she was terminated. As discussed above, the Supreme Court was concerned because Evans allowed the termination claim to go stale. The holding of Evans only precludes the revival of that stale claim and presumably the suit would have been timely if the charges were filed within 180 days of Evans' discharge.

Accordingly, this court agrees with the magistrate that plaintiffs were not subject to a continuing violation of Title VII. However, the court rejects

the magistrate's use of the "date of adoption" and finds that plaintiffs' claims must be dismissed because they failed to file a timely suit within 180 days of the date they were forced to sacrifice their plant seniority rights under the "Tester Concept". At that point in time plaintiffs had lost a valuable employment right. It was inevitable that they would be subject to downgradings or denial of promotions due to their decreased seniority under the "tester concept". Since none of the plaintiffs filed charges within 180 days of the date that they were forced to sacrifice their plant seniority.[6]

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6 For plaintiff Lorance, the time period began to run on the date the Tester Concept was adopted because at that time she was a tester and was thereby required to sacrifice her non-tester seniority. For plaintiff King, the time period began to run on February 25, 1980, the date she became a tester. For plaintiff Bueschen, the time period began to run on November 30, 1980, the date she became a tester. See amended complaint, ¶19(a)(b)(c). None of the plaintiffs filed charges within 300 days. See, supra, n.3.

Summary judgment is entered in favor of all defendants.[7]

IT IS SO ORDERED.

/s/
HARRY D. LEINENWEBER, Judge
United States District Court

DATED: AUG 27 1986

7 The court enters summary judgment in favor of Local 1942 sua sponte as AT&T's motion is equally effective in barring the claim against Local 1942 and plaintiffs have had an adequate opportunity to argue in opposition to the motion. See, e.g., Malak v. Associated Physicians, Inc., 784 F.2d 277, 280 (7th Cir. 1986).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA A. LORANCE, JANICE M. KING and CAROL S. BUESCHEN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	NO. 83 C 6602
vs.	)	
AT&T TECHNOLOGIES, INC., and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

TO THE HONORABLE HARRY D. LIENENWEBER, one of the Judges of the United States District Court for the Northern District of Illinois.

This is an action for discrimination in employment based on sex brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17 (1982)

("Title VII"). The Plaintiffs seek, individually and on behalf of all other women similarly situated, to redress and enjoin unlawful discrimination against women employees by defendants AT&T Technologies, Inc. ("AT&T")[1] and Local 1942, International Brotherhood of Electrical Workers AFL-CIO ("the union"). Defendant AT&T has moved for summary judgment on the grounds that plaintiffs' first amended complaint is time-barred under Section 706(e) of Title VII, 42 U.S.C. §2000e-5(e).

Summary judgment is appropriate where the controlling facts are uncontested and when reasonable minds could not differ on the inferences arising from such facts.[2] The date of

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[1] Prior to January 1, 1984, plaintiffs' employer was known as Western Electric Company, Inc.

[2] Mull v. Arco Durethene Plastics, Inc., No. 85-1023, slip op. at 6 (7th Cir. Feb. 24, 1986).

the alleged discriminatory act triggering the running of the 180 day filing limitations period under Title VII, as well as the date when plaintiffs knew or reasonably should have known of the discriminatory act, can be determined conclusively from the record. The remaining issue in the case, whether the allegedly unlawfully adopted seniority system constitutes a "continuing violation", is a legal one. Accordingly, under these circumstances, summary judgment is an appropriate vehicle for resolving the case.

I. BACKGROUND.

Plaintiffs Patricia A. Lorance, Janice M. King and Carol S. Bueschen are hourly-rated employees of defendant AT&T's Montgomery Works facility in Aurora, Illinois. The facility manufactures data sets, circuit packs, printed wiring boards, and electric

components. Montgomery Works employees fall into several categories, one of which is hourly-rated graded personnel. Hourly wage rates are based on job grades, so that higher rates attach to the higher-graded jobs. The majority of the hourly-rated graded jobs are semi-skilled positions. Plaintiffs contend that these semi-skilled positions have been traditionally filled by women employees.

Within the hourly-rated graded job category are jobs called "tester" positions that are collectively known as the "tester universe." Plaintiffs allege that the tester positions traditionally have been viewed as men's jobs. Moreover, plaintiffs claim that tester positions were filled either by promoting the few men that were located in the lower-graded, non-tester jobs or by hiring men from outside the plant. In

1970, women began to infiltrate the "tester universe" and become "testers".

Plaintiffs allege that in 1979, AT&T and the union conspired to manipulate the seniority system then in effect at Montgomery Works by implementing a system known as the "Tester Concept" in order to protect male testers from women having greater plant seniority, and to discourage women from seeking entry into the tester universe. Prior to 1979, all hourly inter-grade promotions and displacements at Montgomery Works were made on the basis of plant seniority. Under the Tester Concept, all new entrants, male or female, into the tester universe were assigned dual seniority dates. The date of entry to the tester universe governed all upward and downward job movement within the tester universe, and plant seniority governed all other matters.

The Tester Concept originated with the union in late 1978 or early 1979. The concept was heatly debated in several union meetings, and was passed on June 28, 1979 by a hand vote of 90 to 60, reflecting the approximate proportions of men and women in attendance. On July 23, 1979, the union and AT&T entered into a letter of understanding which made the tester concept plant policy. This agreement was incorporated into the master contract between AT&T and the union in August 1980.

On November 15, 1982, plaintiff Lorance, while working as a tester, was downgraded as part of the company's reduction in force policies. Plaintiff King was downgraded on August 23, 1982 and Plaintiff Bueschen was downgraded first, on November 15, 1982, and then again, on January 23, 1984. All three plaintiffs allege that they would not

have been downgraded if they could have retained their plant seniority when they became testers. In addition, plaintiffs claim that they were denied promotions to which they were entitled as a result of defendant's manipulation of the seniority rules.

On April 13, 1983, plaintiffs Lorance and Bueschen filed charges with the Equal Employment Opportunity Commission ("EEOC") claiming that they were discriminated against on the basis of their sex. Plaintiff King filed her charges with the EEOC on April 21, 1983. On June 24, 1983, the EEOC issued to plaintiffs Notices of Right to Sue AT&T, and less than 90 days later, on September 20, 1983, plaintiffs filed their pro se complaint. Plaintiffs then retained counsel and filed their first amended complaint on February 14, 1984. The amended complaint, named the union as

an additional defendant and charged both defendants with discrimination on the basis of sex.

II. DEFENDANTS' AND PLAINTIFFS' LEGAL ARGUMENTS.

Defendant AT&T accurately states that §706(e) of Title VII requires an aggrieved person to file a charge with the EEOC within 180 days of an alleged unlawful employment practice.[3] Accordingly, argues AT&T, because the discriminatory act complained of, the July 23, 1979 implementation of the Tester Concept, occurred over 180 days prior to the 1983 filing of plaintiffs' respective EEOC discrimination complaints, summary judgment should be entered for AT&T and against plaintiffs for their failure to comply with the Title VII 180 day limitations period.

Plaintiffs advance several arguments

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[3] See 42 U.S.C. §2000e-5(e).

opposing defendant's motion for summary judgment. First, plaintiffs contend that the United States Supreme Court has rejected the "date of adoption" theory as a cognizable challenge to an allegedly discriminatory seniority system. Second, plaintiffs argue that continued enforcement of a discriminatory seniority system is an ongoing violation of Title VII, and can be challenged at any time under the "continuing violation" doctrine. Third, plaintiffs claim that they were not fully aware of the change in seniority rules by July 1979, and therefore, the running of the 180 day limitations period was tolled. Finally, plaintiffs maintain that acceptance of defendant's date of adoption theory would lead to needless litigation.

III. RECOMMENDATION.

The filing of a timely charge with the EEOC is a prerequisite to a private

suit under Title VII.[4] Accordingly, the issue presented is whether the plaintiffs filed their charges with the EEOC within 180 days of the allegedly unlawful employment practice.

The date of the unlawful employment practice. The unlawful employment practice complained of was defendants' change-over from plant seniority to "tester" seniority for the tester universe, which change was implemented on July 23, 1979 through AT&T's and the union's letter of understanding of the same date. Assuming that the letter of understanding did not make the change in seniority rules official, the rules unquestionably became official plant

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[4] United Air Lines, Inc. v. Evans, 431 U.S. 553, 555, n. 4 (1977); Lowell v. Glidden-Durkee, Div. of SCM Corp., 529 F. Supp. 17, 18-19 (N.D. Ill. 1981) (The statutory scheme of Title VII confers jurisdiction on the federal courts only if a charge is filed with the EEOC within certain limitation periods).

policy when incorporated into the AT&T-union master contract in August of 1980.

The filing dates of the EEOC discrimination charges. The pleadings indicate that the plaintiffs filed EEOC charges in April 1983. Given the fact that defendant's alleged unlawful employment practice either occurred in the summer of 1979, or at the latest August 1980, plaintiffs' filing of charges in April 1983, greatly exceeded the 180 day limitations period. Consequently, plaintiffs' EEOC claims were not timely filed, and the court is without jurisdiction. Therefore, defendant AT&T's motion for summary judgment should be granted. None of the arguments advanced by plaintiffs persuade this court to alter its recommendation.

Plaintiffs' argument that summary judgment should be denied because use of a discriminatory seniority system is an

ongoing violation of Title VII, and, therefore, can be challenged at any time under the "continuing violation" doctrine, is totally without merit. In applying the 180 day filing limitations period under Title VII, the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act occur.[5] It is now established law that where a collective bargaining agreement and its enforcement are both neutral on their face, and the discriminatory act complained of is the time-barred unlawful execution of the agreement, a Title VII employment discrimination case cannot be established. As stated by the Supreme Court, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for

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[5] Mull v. Arco Durethene Plastics, Inc., No. 85-1023, slip op. at 6 (7th Cir. Feb. 24, 1986).

employment discrimination."[6] Application of the "continuing violation" doctrine to Title VII cases involving neutral seniority systems and the time-barred act of the system's discriminatory implementation has been firmly rejected by the Supreme Court.[7] It is

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[6] Delaware State College v. Ricks, 449 U.S. 250, 257 (1980).

[7] See United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977) (a challenge to a neutral seniority system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim of discrimination against the employer). See also, Bertheas v. Trans World Airlines, Inc., 450 F. Supp. 1069 (E.D.N.Y. 1978) (where the alleged discriminatory act is the actual change in seniority systems and challenges to this act are time-barred, no present violation of Title VII exists by virtue of the application of the new seniority system, which is not discriminatory on its face, so as to validate plaintiff's otherwise untimely EEOC charge under the theory of "continuing violations") and Grimes v. Louisville and Nashville R. Co., 583 F. Supp. 642, 647 and 648 (S.D.Ind. 1984) (the simple act of being laid off due to a lack of seniority is not of itself

unfortunate, but plaintiffs have slept on their Title VII rights and cannot now revive them by means of the "continuing violation" doctrine.[8]

Plaintiffs' knowledge of the change in seniority rules. Plaintiffs' sworn statements contained in their affidavits

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unlawful, and to allow plaintiff to cloak with illegality his layoff by reliance upon earlier events which are now time-barred would result in the revival of what are now legally defunct claims).

[8] Plaintiffs' argument that the Supreme Court has rejected the contention that persons aggrieved by a discriminatory seniority system must file EEOC charges within 180 days of the adoption of the challenged system (characterized by plaintiff as a "date of adoption" theory), is but another way of advancing its "continuing violation" argument, and is rejected on the same grounds as noted above. The cases cited by plaintiffs do not support this position.

Plaintiff's argument that this "date of adoption" theory leads to needless litigation is but yet another collateral challenge to established Supreme Court decisional law rejecting application of the "continuing violation" theory to neutral seniority system, and is rejected.

that they were not fully aware of the change in seniority systems until the time of their downgradings, is not supported by the record. Plaintiffs' deposition testimony contradicts their affidavits. In plaintiff King's deposition, she admits that she was aware that tester seniority was in effect when she became a tester in 1980.[9] In addition, all three plaintiffs were present at the June 1979 union meeting where the change in seniority systems was approved.[10] Furthermore, plaintiff Lorance acknowledged that she felt discriminated against on the basis of her sex at the June 1979 meeting.[11] Finally, the change from plant to tester seniority was incorporated into the master contract

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[9] King Dep. 122-123.

[10] Lorance Dep. 98; Bueschen Dep. 40; King Dep. 102.

[11] Lorance Dep. 118.

between AT&T and the union in August of 1980 and, thus, was published to the world.[12] A violation of Title VII occurs and triggers the 180 day time limit for filing EEOC charges when the employee knew or should have known that she was discriminated against.[13] The uncontested facts show that plaintiffs either knew or should have known by August 1980, at the latest, that tester seniority was official company policy.

IV. CONCLUSION.

This court finds that plaintiffs did not file their EEOC charges within the 180 day statutory time period of Section 706(e) of Title VII. Consequently, plaintiffs' claim is time-barred. Therefore, it is recommended that

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[12] Defendants' Reply Memorandum at 19; n. 10; Lorance Dep. 172-173.

[13] Stewart v. CPC Intern., Inc., 679 F.2d 117, 120 (7th Cir. 1982).

Defendant AT&T's Motion for Summary Judgement be granted.[14]

Respectfully submitted,

/s/
W. Thomas Rosemond, Jr.
United States Magistrate

Dated: March 21, 1986

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[14] Counsel are given ten days from the date hereof to file exceptions to this Report and Recommendation with the Honorable Harry D. Lienenweber.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICIA A. LORANCE, *et al.*

Petitioners,

v.

AT&T TECHNOLOGIES, INC., *et al.*

Respondents.

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION RESTATED

Petitioners claim that a seniority system was adopted with a discriminatory motive in violation of the 1964 Civil Rights Act.

The question presented in this case is whether the strict 180 day statute of limitations of Title VII was properly held to bar litigation of this claim when EEOC charges were not filed until (1) some three years after *both* the date of adoption of the seniority system *and* the "forced surrender" of each plaintiffs' seniority and (2) at a time when any evidence of discrimination was necessarily stale because the claim was based solely on motive?

STATEMENT REQUIRED BY RULE 28.1

AT&T Technologies is a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Cincinnati Bell Inc.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; ShareTech, Inc.; Covidea; Counterpoint Computers, Inc.; Omnicad Technology Corporation; Intermetrics, Inc.; AT&T Microelectronia de Espana, S.A.; Mitek, Inc.; Resound Corporation; Global Transactions Services Company; and Sun Microsystems, Inc.

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tion" to the general rule that a Title VII violation may be proven by showing a "discriminatory impact." *Teamsters* v. *United States,* 431 U.S. 324, 329 (1977). The only relevant question in a case challenging the terms of a seniority system is whether the "actual motive" at the time of adoption was discriminatory. *Pullman Standard* v. *Swint,* 456 U.S. 273, 290 (1982). Section 703(h) is designed to "immunize [all] seniority systems which perpetuate post-Act discrimination" from challenges unless they are timely filed (*American Tobacco,* 456 U.S. at 75) and thereby "to protect vested seniority rights." *Id.* at 78 (Brennan, J., dissenting on other grounds). This Court has recognized that seniority is "the most valuable capital asset that the worker owns," and an employee thus suffers immediate injury whenever seniority rights are depleted. *Wygant* v. *Jackson Board of Education,* 106 S.Ct. 1842, 1851 (1986).

The only "discriminatory acts" that are alleged in this case are the changes in the three petitioners' seniority rights that were made in 1979 and 1980. By holding that the challenge was untimely because it was not filed within 300 days, the Seventh Circuit merely applied the criteria of *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980), to a set of unique facts. The holding was also required by the terms and purposes of Section 703(h) and by this Court's decision in *American Tobacco* v. *Patterson.* There is no reason or basis to review the Seventh Circuit's decision.

This is especially so because the Seventh Circuit is the first court of appeals to apply Title VII's statute of limitations to a challenge to a seniority system under the criteria of Section 703(h). Each decision cited in the petition is readily distinguishable on this basis. At the present time, there is no indication that the question of when a Section 703(h) challenge to a seniority system may be filed will prove to be an important one which will divide the courts of appeals. The issue has not yet produced a conflict in those courts and is not, under any view, mature enough for consideration by this Court.

1. As the lower courts found, this is a case in which the three petitioners knowingly "slept on their Title VII rights." App. 47a. Petitioners made a deliberate decision not to challenge the changes in their seniority rights until three years after they occurred.

The change in the seniority system was implemented in July 1979. AT&T Technologies ("the Company") and Local 1942, International Brotherhood of Electrical Workers ("the Union") then adopted and implemented dual seniority dates for persons working in highly skilled and technologically complex "Tester" jobs that require special training. Under the change, all "testers" with less than five years experience were required to "surrender" their plant wide seniority for purposes of promotions and demotions within the tester category unless and until they enrolled in, and successfully completed, specified technical courses of instruction. However, plant-wide seniority continued to govern layoffs.

At the time the dual seniority system was adopted, the three petitioners believed that this change and the "forced sacrifice" of their plant-wide seniority rights constituted intentional sex discrimination that violated Title VII and that had immediate adverse effects on them both (1) on the very day that the change was adopted in July 1979[2] and (2) again when the two petitioners

[2] Petitioners claimed that the dual seniority provisions for testers were created and negotiated with the purpose of protecting male jobs in the "traditionally male" tester category. The adoption of the change in July, 1979 was claimed to have the immediate discriminatory effects of (1) compelling participation in the Tester "module" (training) program because "this is what [we] had to do to get [our] time back;" (2) "discourag[ing] women from entering the traditionally-male tester jobs" by requiring them to forfeit their plant-wide seniority; and (3) preventing female testers who were then testers (like petitioner Lorance) from exercising their greater plant seniority against junior male testers. R. 68B at 44-45, 73-74; R. 68B at 20, 131-32; R. 16, ¶¶ 18, 20.

The Company flatly denies that the provisions requiring dual tester seniority lists were adopted for discriminatory reasons. Such systems are commonplace in industry. Their "basic premise" is "to promote 'hands-on' experience" and to assure that persons best equipped to perform technologically complex jobs are not forced into lower job grades when there are downgrades and layoffs. R. 68B-1, Ex. 3, p. 2; Ex. 21, p.2.

who were not already testers entered the tester universe in 1980 and surrendered their plant-wide seniority.[3] As one petitioner testified, "[a]lready by this time [1979] I had made the decision in my mind that *what was going on was illegal* and that I was going to . . . *let a court decide what was right or wrong.*" R. 68C at 22, 146 (emphasis added); see R. 68B at 98, 118. It was on this basis that petitioners led the "heated" opposition of certain female employees to the change in 1979. App. 5a; R. 68C at 90, 98. Each petitioner testified that she understood that she had "surrendered" and "sacrifice[d]" plant-wide seniority for job movement purposes no later than "the day we went into testing." R. 68A at 39, 40, 127; R. 68C at 132.

Yet petitioners did not file EEOC challenges when the "forced sacrifice" of their seniority and other alleged adverse consequences occurred. Instead, they chose "to live by it" (R. 68C at 132) and began the training that would restore their plant-wide seniority, even though this training requirement was one of the claimed "discriminatory effects" of the new seniority system. See p. 3, n. 2, *supra.*

Petitioners did not file EEOC charges until after they were downgraded in late 1982. As petitioners concede, this downgrading was merely the delayed consequence of the surrender of their plant-wide seniority that occurred years earlier. All agree that the revised seniority system is neutral on its face and has been applied in a nondiscriminatory fashion.

Petitioners' claim that they are victims of sex discrimination rests on one and only one allegation: that the dual seniority system was "created and negotiated [in 1979] with the intent to advantage male workers over female workers." Petition, p. 31; Complaint (R. 16), paras. 14-18. That claim had been stale for over three years by the time petitioners finally filed their charges.

[3] Petitioner Lorance entered the tester category on October 30, 1978; Petitioner Bueschen on November 30, 1980; and Petitioner King on February 25, 1980. App. 5a.

2. In Title VII, Congress made a judgment that "most genuine claims of discrimination will be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh [any] federal interest in guaranteeing a remedy." *Mohasco Corp.* v. *Silver,* 447 U.S. 807, 825-26 (1980). This Court has held that the "proper focus [in determining when the 180 day limitations period begins to run] is upon the time of the *discriminatory acts,* not upon the time in which the *consequences* of the acts become most painful." *Delaware State College* v. *Ricks,* 449 U.S. 250, 258 (1980) (emphasis in original; citations omitted). See also *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977).

In this case, the only "discriminatory acts" that petitioners alleged is the change in the seniority system which occurred in 1979—or the forced sacrifices of petitioners' plant-wide seniority which occurred in 1980 at the latest. This change depleted what is "probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home" (*Wygant* v. *Jackson Board of Education,* 106 S.Ct. 1842, 1851 (1986) (citations omitted))—and was thus immediately actionable under *Delaware State College* v. *Ricks.*[4] By contrast, the downgrades that occurred in late 1982 were merely the "consequences" of the dual seniority lists established some three years earlier. Thus, the Court of Appeals' holding is simply a correct application of the criteria of *Delaware State College* v. *Ricks* to the unique facts of this case.

Furthermore, the terms and purposes of Section 703(h) independently required the dismissal of this case. To the extent courts have held that "each application" of a discriminatory policy or practice "constitutes a [separately] actionable wrong" (Petition,

[4] The fact that the plaintiffs had hoped that the 1979-1980 surrenders of seniority rights would not thereafter lead to demotions (see Petition, p. 8) did not prevent the limitations period from beginning to run on those dates; in *Ricks,* the Court held that the plaintiff's hope that his denial of tenure would be reversed in grievance proceedings, or otherwise, did not toll the limitations period until the date that he was discharged. See 449 U.S. at 260-61.

p. 13), they have done so in cases in which Title VII violations may be established by showing that the applications of the policies or practices have a discriminatory impact (*see Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)) or in which neutral terms have been misapplied in a discriminatory fashion. See *Boyd* v. *Madison County Mut. Ins. Co.*, 653 F.2d 1173, 1176-77 (7th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982). Because each application of the employment provision constitutes the evidence of discrimination, the violation is proven by showing what happened within the limitations period; hence, there can be no "staleness concern" in these cases. Petition, p. 35-36, quoting *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-381 (1982).[5]

Under Section 703(h), however, challenges to facially neutral seniority systems are an "exception" to the general rule of *Griggs*. *Teamsters* v. *United States*, 431 U.S. 324, 349 (1977). The effects of each application of the system are irrelevant. *Pullman Standard* v. *Swint*, 456 U.S. 273, 290 (1982). The only inquiry is one of the parties' "actual motive": "[w]as the system *adopted* because of its [alleged sexually] discriminatory impact?" *Id.* (emphasis added). In this very case, therefore, the sole basis for petitioners' claims is that the change was made with an improper motive. Thus, petitioners are reduced to making the extreme, and untenable, argument that the adoption of the tester seniority provisions in 1979—and the parties' "actual motive" in 1979—can be litigated "indefinitely," be it 1982, 1988, or 2088. Proof of motive in 1979 concerns events that occurred in 1979, and necessarily depends on the kinds of evidence whose probative value fades quickly with the passage of time. This case, therefore, epitomizes the litigation of stale claims that Title VII is designed to prevent, and the Seventh Circuit properly rejected petitioners' argument. App. 8a.

[5]Thus, the Fourth Circuit was able to reject a timeliness challenge to a recent application of a seniority system only because it held (erroneously) that Section 703(h) does not apply to seniority systems adopted after 1965 and that each application of post-Act systems can be challenged under the *Griggs* discriminatory impact test. *Patterson* v. *American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980), *rev'd on this ground*, 456 U.S. 63 (1982).

In this regard, the rule that is dictated by the terms and purposes of Section 703(h) is the same rule that applies under the parallel limitations provision of the National Labor Relations Act (see *International Association of Machinists* v. *NLRB*, 362 U.S. 411 (1960)): that a change in a facially neutral seniority system must be challenged within 180 (or 300) days of its adoption. Otherwise, the adoption of the allegedly discriminatory system "is the legal equivalent of a discriminatory act which occurred before the statute was passed" (*United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977)), and any future discriminatory effects are immunized from challenge by Section 703(h). See *Teamsters* v. *United States, supra.* Contrary to the petitioners' claims, that position is compelled by the Court's holding in *American Tobacco Co.* v. *Patterson.*[6] There, the Court held that "taken together, *Teamsters* [by interpreting Section 703(h)] and *Evans*" [by strictly enforcing the Title VII limitations period] "immunizes [all] seniority systems which perpetuate post-Act discrimination." *American Tobacco Co.*, 456 U.S. at 75. There is no distinction between systems adopted before the Act was passed and post-Act systems that are not challenged within 180 days of adoption. *Id.*

However, in this case, there is no need to address the question whether the limitations period begins to run on the date of adoption of the seniority system (as respondents argued below) or on the date the last of the three petitioners became testers and unequivocally surrendered their seniority (as the Seventh Circuit

[6]The petition twice (pp. 23 n.11 & 31) quotes the Court's statement that "the adoption of a seniority system which had not been applied would not give rise to a cause of action." *American Tobacco Co.*, 456 U.S. at 69. However, the Court made this statement in *rejecting* the EEOC's "proposed distinction between the application and adoption of a seniority system" and its contention that the adoption of a system could be challenged under the *Griggs* discriminatory impact test, whereas the application could not. *Id.* What the Court said was that this distinction "on its face makes little sense [because] [t]he adoption of seniority system which has not been applied would not give rise a cause of action" under *Griggs;* a discriminatory impact obviously cannot be shown until a system is applied. *Id.*

held). The claims of the three petitioners were untimely under either standard. The Seventh Circuit's discussion of the issue was thus dictum.

3. This is the first case in which a federal court of appeals has applied the Title VII limitations period to a challenge to a seniority system under the criteria of Section 703(h). The one Title VII case that involves seniority is the Fourth Circuit's decision in *American Tobacco. Patterson* v. *American Tobacco Co.,* 634 F.2d 744 (4th Cir. 1980), *rev'd,* 456 U.S. 63 (1982). However, it rested on the erroneous premise that Section 703(h) does not apply in post-Act systems and that the *Griggs'* discriminatory impact test does—and is irrelevant for that reason. See p. 6, n.5, *supra.* The other cases cited in the petition are similarly irrelevant, and the Seventh Circuit's decision does not conflict with the decision of any other court of appeals.

For example, the only court of appeals' decision that purports to reject the Seventh Circuit's holding is the First Circuit's recent decision in *Johnson* v. *General Electric Co.,* No. 87-1752, slip op. at 7-8 (1st Cir. Feb. 22, 1988). However, *Johnson* did not involve a challenge to a seniority system, and the First Circuit, ironically, acknowledged that the Seventh Circuit has applied the First Circuit's rule in nonseniority cases. See *id.* at 9, citing *Heiar* v. *Crawford County,* 746 F.2d 1190, 1194 (7th Cir. 1984), *cert. denied,* 427 U.S. 1027 (1985). This underscores that the Seventh Circuit would probably have decided *Johnson* (and any other nonseniority case) the same way the First Circuit did.

The petition also relies on two cases in which the provisions of seniority systems were challenged under the Age Discrimination in Employment Act (ADEA). *Cook* v. *Pan American World Airways, Inc.,* 771 F.2d 635 (2d Cir. 1985), *cert. denied,* 474 U.S. 1109 (1986); *Morelock* v. *NCR Corp.,* 586 F.2d 1096 (6th Cir. 1978), *cert. denied,* 441 U.S. 906 (1979). Quite apart from the fact that the ADEA and Title VII have somewhat different substantive provisions governing seniority systems (compare 42 U.S.C. § 2000e-2(h), with 29 U.S.C. § 623(f)), the discussion of the timeliness issue in each decision was dictum, and there is no reason to believe that either court would today decide the instant case differently than did the Seventh Circuit.

In *Cook,* the plaintiffs filed their EEOC charges within 300 days of the date "when Pam Am first implemented the allegedly discriminatory seniority lists" (771 F.2d at 646) and "at the time [the] plaintiffs first bec[a]me subject" to the new system. App. 9a. Their claims were thus timely filed under the Seventh Circuit's holdings. See *id.* In *Morelock,* the discussion was dictum because the seniority system was found to be lawful (see 586 F.2d at 1105-07); more significantly, *Morelock* was decided before *Delaware State College* v. *Ricks,* and adopts the approach that this Court repudiated in that decision. Thus, there is no basis for any claim that the Sixth Circuit would disagree with the Seventh Circuit's holding in this case now that *Ricks* is the law.

The Seventh Circuit's decision was correct and should not be disturbed. In any event, there is no square circuit conflict today, and a conflict may never arise. If it does, that will be the time to consider whether the issue warrants this Court's consideration.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

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No. 87-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICIA A. LORANCE, *et al.*,
Petitioners,

v.

AT&T TECHNOLOGIES, INC., *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. The decision in Lorance v. AT&T Technologies, Inc., 827 F.2d 163 (7th Cir. 1987), conflicts with three circuits which have ruled that the operation of a discriminatory seniority system is a continuing violation which gives rise to a

cause of action on each occasion when it is applied, with one circuit that held that each application of a discriminatory collective bargaining provision was a new violation, and with a fifth circuit which determined that the "mere existence" of a discriminatory system does not give rise to a cause of action until the system is actually applied. Petition at 16-24. Recently, the First Circuit analyzed the conflict and rejected the Lorance rule, which requires an employee to file an administrative charge before actually suffering harm from a discriminatory practice. "Such a requirement would be unreasonable, as well as undesirable from a public policy perspective." (Footnote omitted), Johnson v. General Electric, 840 F.2d 132, 136 (1988).

The attempts of AT&T Technologies to explain away or limit these conflicts, in

fact, serve only to underscore them. AT&T argues that Lorance is the first case in which an appellate court applied "the Title VII limitations period to a challenge to a seniority system." Opposition at 8. No other circuit has ruled like Lorance because other circuits which have decided upon the legality of a seniority system have routinely treated the application of a system as a continuing or present violation. As shown by seniority system cases which this Court has decided, suits challenging the legality of a seniority system established years earlier have been regularly considered timely if there was a current application of the system. Petition at 29-32.

The respondent attempts to distinguish the three appellate court decisions that ruled -- contrary to the

Seventh Circuit -- that discriminatory seniority systems are continuing violations. The Fourth Circuit determined that such systems are "truly 'continuing' violations of Title VII." Patterson v. American Tobacco Company, 634 F.2d 744, 751 (1980), vacated on other grounds, 456 U.S. 63 (1982). The respondent asserts that Patterson is inapplicable because the appellate court erred in applying a discriminatory impact standard rather than requiring that a seniority system may be held unlawful only if the system was created or maintained with an intent to discriminate. Opposition at 8. In order to avoid the conflict between Lorance and Patterson, the respondent is forced to rely upon an unprecedented interpretation of the Title VII procedural requirements, that different standards for filing an administrative charge apply depending upon

whether the theory of the case is discriminatory impact or treatment. See also, n.3, infra.

The respondent incorrectly distinguishes two other seniority cases because the systems were challenged under the Age Discrimination in Employment Act and the rulings were dicta. Opposition at 8-9. First, the Court has applied the same standards to the filing requirements of the ADEA as to the Title VII requirements. Petition at 17 n.8. Second, the favorable procedural ruling for the plaintiff is not dictum in Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979), because the system was found lawful. If the procedural ruling were otherwise, the court would never have reached the merits of the seniority system.

Most importantly, all of respondent's attempts to avoid these conflicts fail because the respondent did not account for the striking new rule established in Lorance. The decision in Lorance establishes that a person who may in the future suffer harm from a newly implemented practice must file a lawsuit before her job position is effected. Five circuits, including three which ruled directly on seniority systems, have established a contrary rule. The conflict places potential victims of discriminatory practices and the Federal enforcement agency, the Equal Employment Opportunity Commission, see Petition at 24-28, in a difficult position for determining when administrative charges and lawsuits must be filed.

AT&T Technologies fails to respond to

the other conflicts.[1] Petition at 20-24. Contrary to the assumption of the respondent, there is no logical basis for limiting the Lorance rule to seniority systems. Other practices, such as the imposition of a discriminatory policy controlling early retirement benefits, EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 219 (1983), cert. denied, 469 U.S. 820 (1984), or criteria for job

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[1] In order to support its argument that there is no conflict, the respondent refers to other Seventh Circuit decisions which applied the continuing violation theory. Opposition at 1 n.1, 8. However, the Seventh Circuit defined the scope of the prior opinions: a continuing violation may occur "when an employer acts pursuant to a seniority system that is facially discriminatory" or if it uses its "discretion ... in a discriminatory manner." App. 9a. Accordingly, in Lorance the circuit limited the definitions of a present act of discrimination and continuing violation in a manner which squarely conflicts with the rulings of other circuits. It is beside the point to conjecture, as respondent does, Opposition at 8, how another circuit may read Seventh Circuit opinions which were issued prior to Lorance.

assignment, Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986), or promotional criteria, Furr v. AT&T Technologies, Inc., 824 F.2d 1537 (10th Cir 1987), may effect, just like the seniority practice in Lorance, possible future employment opportunities without any immediate job consequence.

2. The Seventh Circuit failed to follow prior decisions of this Court by ruling that the application of "a facially neutral but discriminatory seniority system" was not a violation of the fair employment law from which a victim could file a timely administrative charge. In particular, this Court has ruled that each application of a discriminatory pay system created years earlier "is a wrong actionable under Title VII," Bazemore v.

Friday, 106 S. Ct. 3000, 3006-07 (1986).[2] AT&T fails to mention Bazemore, the most pertinent Supreme Court authority, but rather relies upon Delaware State College v. Ricks, 449 U.S. 250 (1980).

The factual situation in Ricks is fundamentally different than the situation

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[2] AT&T asserts that "[t]o the extent courts have held that 'each application' of a discriminatory policy 'constitutes a [separately] actionable wrong' they have done so in cases" based upon the "discriminatory impact" theory or "in which neutral terms have been misapplied in a discriminatory fashion." Opposition at 5-6. Bazemore is to the contrary. The Court held that a pay system applied in a facially neutral manner was unlawful because it was based upon a wage structure that had been influenced by intentional discrimination. Even though pay decisions were made on a racially neutral basis since 1965, the system was illegal because "some pre-existing salary disparities continue to linger on." 106 S. Ct. at 3006. Similarly, the seniority system at AT&T has been applied in a facially neutral manner but the discriminatory results of the 1979 seniority change in the seniority system which stripped workers of their plant seniority continued to "linger on" and caused the 1982 job demotions of the plaintiffs.

in Lorance. Petition at 33. The allegedly discriminatory tenure decision led to "a delayed but inevitable" termination of Ricks' employment. 449 U.S. at 257-58. At AT&T the job demotions of the plaintiffs were not "inevitable," but depended upon the continued application of the discriminatory seniority system. It is the subsequent application of the seniority system, like the application of the pay system in Bazemore, that makes the job demotions in Lorance a current actionable wrong.

3. Under the lower court's rule the petitioners would have had to file administrative charges within 300 days of the imposition of the discriminatory seniority system and a lawsuit following the completion of the administrative process even though the seniority system had had no adverse effect and may never

have had any adverse effect on their job position. Petition at 37-38. Moreover, as AT&T Technologies admits, the discriminatory seniority forfeiture provision lasts for approximately five years until the petitioners completed certain "courses of instruction." Opposition at 3. Nevertheless, AT&T argues that "[t]he fact plaintiffs had hoped that the ... surrender[ ] of seniority rights would not ... lead to demotion[ ]" does not mean that plaintiffs do not have to file a lawsuit before the seniority system causes their job demotion. Id. at 5 n.4.

Since the discriminatory seniority forfeiture ends after approximately five years, the Seventh Circuit rule would require the plaintiffs to file a lawsuit prior to any adverse job action despite the fact that the lawsuit might have

become moot when the discriminatory forfeiture provision ended after five years. It is hard to imagine a rule more counter-productive to the efficient administration of the fair employment laws than to require workers to file federal lawsuits before their job positions have been adversely affected and where there is a substantial likelihood that their claims may become moot because the discriminatory practice may end before it is ever implemented.[3]

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[3] Moreover, three circuits have held, contrary to the Seventh Circuit, that the "mere existence" of a discriminatory policy does not provide the basis for a cause of action. Petition at 22-24. The Respondent fails to address this conflict but attempts to distinguish this Court's decision to the same effect that "[t]he adoption of a seniority system which has not been applied would not give rise to a cause of action." American Tobacco Co. v. Patterson, 456 U.S. 63, 69 (1982). Opposition at 7 n.6. The Respondent's assertion that the Patterson rule only applies to disparate impact cases fails in light of the Court's assertion that "[s]uch application is not

4. The respondent implicitly rejects the standard of the Seventh Circuit by requiring those persons harmed or who may in the future be harmed by a discriminatory seniority system to challenge the system within 300 days of its imposition. Opposition at 7. The respondent's proposed rule like the Seventh Circuit rule -- which does not commence the running of the statute of limitations unless the workers were employed in the affected job category and knew or should have known that the system was discriminatory -- runs contrary to this Court's application of Title VII to seniority systems. A worker harmed by a "current operation" of a discriminatory

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infirm under §703(h) unless it is accompanied by a discriminatory purpose." (Emphasis added). Id. at 70. Thus, the Court referred to cases, like Lorance, which involve the allegation of discriminatory intent.

seniority system may challenge the legality of the system. United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977). Repeatedly, the Court has determined that a current operation of a facially neutral seniority system may trigger a fair employment action that will turn upon whether the adoption of the system that occurred years earlier was affected by intentional discrimination. Petition at 29-32.

The respondent rejects the appellate court's standard while at the same time it argues that the Court should not review the decision which relied upon that standard. However, the respondent's position is mandated by the fact that it repeatedly criticizes the petitioners' position as inevitably leading to the litigation of stale claims, Opposition at 4-6. Since under the Seventh Circuit's

rule an employee transferring into a tester job or an employee who did not have reason to know that the system was discriminatory may challenge the system, the system may be timely challenged years after it is implemented. The Lorance rule serves neither the purpose of ridding the workplace of discriminatory practices and their effects, which the petitioners advocate, nor the purpose of preventing "stale" claims, which the respondent advocates.

The Lorance decision conflicts with decisions of this Court and with other appellate decisions, unjustly deprives female workers in the AT&T plant of an opportunity to challenge a seniority system intentionally designed to discriminate, and serves no purpose

consistent with the fair and efficient implementation of the equal opportunity laws.

Respectfully submitted,

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BRIEF

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No. 87-1428

In the Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA A. LORANCE, ET AL., PETITIONERS

v.

AT&T TECHNOLOGIES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether in the case of an employment discrimination charge alleging that the complainant was demoted pursuant to a facially-neutral, but intentionally discriminatory seniority policy, the statute of limitations of Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), begins to run when the employer first adopts the seniority policy, when the employee first becomes subject to the policy, or when the employee is first notified of the demotion.

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners Patricia A. Lorance, Janice M. King, and Carol S. Bueschen are hourly wage employees at the Montgomery Works plant of respondent AT&T Technologies, Inc. (AT&T), in Aurora, Illinois.[1] They are also members of respondent Local 1942, International Brotherhood of Electrical Workers, AFL-CIO (Union). Pet. App. 4a. Petitioners Lorance and Bueschen have been employed at the plant by AT&T since

[1] Because the courts below awarded summary judgment to respondents based solely on the untimeliness of the charge, our statement, like those contained in the lower courts' opinions, is based on the facts alleged in petitioners' complaint.

1970, and petitioner King commenced work there in 1971 (*ibid.*). At that time, promotions and demotions at the plant were based on plant-wide seniority (*ibid.*).

Most hourly wage jobs at the plant are semi-skilled jobs and have traditionally been filled by women (Pet. App. 15a). Among the highest paying hourly wage jobs at the plant are "tester" jobs (*id.* at 4a, 15a). Tester positions were traditionally filled by men who were either promoted from among the relatively few men in the lower paying wage jobs or hired directly into tester positions (*id.* at 15a). All three petitioners were originally employed in nontester positions.

By 1978, an increasing number of women obtained tester positions based on their plant-wide seniority (Pet. App. 4a). In July 1979, AT&T and the Union modified the collectively bargained seniority system applicable to the Montgomery Works plant to provide that promotions and demotions of testers with less than five years of tester service, who have not completed a training program for the tester job would be governed by seniority as a tester rather than plant-wide seniority (*ibid.*; Compl. ¶ 17).[2] The new seniority plan was known as the "Tester Concept" (Pet. App. 4a). Petitioner Lorance was a tester at the time the seniority system was changed (*id.* at 5a). Petitioners Bueschen and King became testers in 1980 (*ibid.*).

In late 1982, AT&T began a reduction in force and, based on its new seniority system, demoted all three petitioners (Pet. App. 5a). Petitioners Lorance and King were demoted from senior testers to junior testers and petitioner Bueschen was demoted to a nontester position (*ibid.*).[3] Petitioners would not have been demoted if AT&T had implemented the reduction in force on the basis of each petitioner's plant-wide seniority (*ibid.*). Within 300 days of their demotions, petitioners filed administrative charges with the Equal Employment Opportunity

[2] The Union approved the new plan by a vote of ninety votes to sixty, which was approximately the ratio of men to women (Pet. App. 5a).

[3] King was downgraded on August 23, 1982. Lorance and Bueschen were downgraded on November 15, 1982, and Bueschen was downgraded a second time on January 23, 1983. Pet. App. 17a.

Commission (EEOC) claiming that their demotions violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[4] The EEOC determined that there was not reasonable cause to believe that petitioners allegations were true and, accordingly, issued them right-to-sue letters (Pet. App. 5a).

2. Petitioners subsequently brought this lawsuit in the United States District Court for the Northern District of Illinois pursuant to Section 706(f) of Title VII, 42 U.S.C. 2000e-5(f).[5] In their complaint, petitioners allege that respondents AT&T and Union changed the seniority system in 1979 "in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs" (Compl. ¶ 14). They also allege that application of this provision has had the effect of favoring male testers over female testers (*id.* ¶ 18; see also *id.* ¶ 6(f)).

The district court granted respondent AT&T's motion for summary judgment and, sua sponte, also granted summary judgment in favor of respondent Union (Pet. App. 12a-33a).[6] The court agreed with AT&T that petitioners' challenge was time-barred because they had failed to file their charges with the EEOC within the applicable limitations period established by Section 706(e) of Title VII (42 U.S.C. 2000e-5(e)).[7] The court ruled that the limitations period started to run when each petitioner first became subject to the new seniority policy as a tester (Pet. App. 26a, 32a). In doing so, it rejected petitioners' contention that the limitations period commenced when they were de-

[4] Petitioners Lorance and Bueschen filed charges with the EEOC on April 13, 1983, and petitioner King filed her charge on April 21, 1983 (Pet. App. 18a).

[5] Petitioners brought this suit as a class action, but the district court has yet to rule on their motion to certify the class (see Pet. App. 6a n.1).

[6] The district court adopted the recommendation of the magistrate that summary judgment should be entered in favor of respondents (Pet. App. 34a-50a).

[7] AT&T argues that Title VII's 180-day limitation period applies rather than its 300-day limitations period, but the courts below did not address the issue because under their analysis petitioners' charges were untimely in either event (see Pet. App. 6a n.2, 19a-20a n.3).

moted in 1982 (*id.* at 25a-27a), and likewise rejected AT&T's claim, which the magistrate had accepted (*id.* at 43a-44a), that the limitations period commenced for all petitioners in 1979 when AT&T first adopted the seniority policy (*id.* at 27a-31a). Because, as the court found, each petitioner filed his charge more than 300 days after the time each first became subject to the new policy as a tester, the court concluded that petitioners' complaint should be dismissed because none had timely filed her charge with the EEOC (*id.* at 32a-33a n.6).

3. The court of appeals affirmed (Pet. App. 3a-11a). The court agreed that petitioners' argument was "logically appealing," but concluded that it was "compelled to reject it" because "[i]f we were to hold that each application of an allegedly discriminatory seniority system constituted an act of discrimination, employees could challenge a seniority system indefinitely" (*id.* at 8a). Like the district court, however, the court of appeals also rejected AT&T's argument that the "adoption" of the seniority system constituted the relevant act that triggered the running of Title VII's limitations period (*ibid.*). According to the court, such a rule would "encourage needless litigation" by employees not even yet formally subject to the seniority plan and would also "frustrate the remedial policies that are the foundation of Title VII" by providing future employees with no recourse against a seniority system they thought discriminatory (*ibid.*).

The court of appeals determined that to strike a "balance that reflects both the importance of eliminating existing discrimination, and the need to insure that claims are filed as promptly as possible," the rule should be that "the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially-neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory" (Pet. App. 9a). The court concluded that because affidavits submitted by petitioners established that they knew they were subject to the new seniority policy on the day they became subject to it as testers, the limitations period commenced on that date. Hence, the court found, petitioners' charges were not timely filed with the EEOC because they were filed two to three years after each petitioner was first subject to the new policy, which is far beyond the 300-day limitations period provided by Title VII (*ibid.*). See note 4, *supra*.[8]

Judge Cudahy dissented (Pet. App. 10a-11a). He agreed that the majority's policy concerns were "important," but contended that they "find dubious application in the result here" (*id.* at 11a). He explained that the majority's rule would not achieve its goal of preventing suits against seniority plans adopted long ago, but instead would merely limit the plaintiffs who could maintain a lawsuit to those more recently hired (*id.* at 10a). Judge Cudahy also faulted the majority for announcing a legal rule that would require employees to bring premature lawsuits. When an employee is first subject to a seniority policy, the dissent explained, he has not yet been injured by it and does not know whether he ever will be. *Ibid.*[9]

DISCUSSION

Like petitioners, we believe that the decision of the court of appeals is incorrect, conflicts with decisions of other courts of appeals, and presents an important question of federal employment discrimination law. We accordingly urge the Court to grant the petition for a writ of certiorari.

1. Section 706(e) of Title VII provides that where, as in this case, there is a state fair employment practice agency with overlapping jurisdiction, an employment discrimination charge must be filed with the EEOC within 300 days "after the alleged unlawful employment practice occurred" (42 U.S.C. 2000e-5(e)).[10]

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[8] The court described (Pet. App. 9a) its holding as "a narrow one," noting that the relevant act of discrimination may be different where, unlike this case, the seniority policy is facially discriminatory or the employer exercises discretion provided by the plan in a discriminatory fashion.

[9] The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc (Pet. App. 1a-2a). Judges Easterbrook, Ripple, and Cudahy voted in favor of rehearing en banc (*id.* at 2a n.*).

[10] As previously noted (see note 7, *supra*), AT&T claims that the applicable limitations period in this case is 180 (not 300) days because, although there is a

Hence, "[d]etermining the timeliness of [petitioners'] EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the 'unlawful employment practice' of which [they] complain[ ]." *Delaware State College* v. *Ricks,* 449 U.S. 250, 257 (1980). "[T]he critical question is whether any present violation exists." *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977) (emphasis omitted).

The gravamen of petitioners' complaint is that respondent AT&T violated Title VII by demoting them pursuant to a seniority policy that, while facially neutral, intentionally discriminates against them on the basis of their sex and, hence, falls outside the protective ambit of Section 703(h).[11] Hence, if, as respondent AT&T contends, the unlawful practice "occurred" when AT&T first adopted the seniority policy or, as the court of appeals held, when it was made known to each petitioner that her seniority rights would be determined under the new policy, then petitioners' charges would clearly be time-barred because petitioners did not file their charges within 300 days of either of those events. If, on the other hand, the unlawful practice occurred on the date of petitioners' demotion, their filings with the EEOC would be timely.

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state fair employment practice agency with overlapping jurisdiction, respondents "failed to file timely charges with the applicable state 'deferral' agency" (Appellee AT&T C.A. Br. 12 n.10). The lower courts did not address this question because the resolution of that issue would not have affected their disposition of the case (see Pet. App. 6a n.2, 19a-20a n.3). We note, however, that to the extent that respondent AT&T's assertion rests on an allegation that state proceedings were not timely instituted under state law, it cannot survive this Court's recent decision in *EEOC* v. *Commercial Office Products Co.*, No. 86-1696 (May 16, 1988), slip op. 14 ("state time limits for filing discrimination claims do not determine the applicable federal time limit"). In any event, the question whether the 180 or 300-day limitations period applies does not preclude review of the question presented by the petition because petitioners Lorance and Bueschen filed their charges with the EEOC within 180 days after their demotions (see notes 3, 4, *supra*).

[11] See 42 U.S.C. 2000e-2(h) ("[I]t shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate * * *.").

We agree with petitioners that their charges were timely filed because the date of their demotions was the date on which the "alleged unlawful employment practice occurred," within the meaning of Section 706(e). Each application of a discriminatory seniority system to alter an employee's employment status, like each application of a discriminatory salary structure to determine an employee's weekly paycheck, "is a wrong actionable under Title VII." *Bazemore* v. *Friday,* 478 U.S. 385, 396 (1986) (discriminatory salary structure).[12] In our view it is no bar to the bringing of a challenge confined to the *current application* of an allegedly discriminatory seniority policy that its previous applications of the same policy are not now subject to legal challenge under Title VII, either because the limitations period has expired or because Title VII was not then in effect. Cf. *id.* at 395.

Contrary to the court of appeals' decision, neither this Court's decision in *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977), nor its ruling in *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980), compels a different result.[13] In both of those cases, the Court held that employment practices that merely perpetuate the consequences of prior discrimination are not themselves actionable wrongs under Title VII and, hence, the applicable limitations period begins to run on the date of the prior discriminatory act. Thus, in *Evans,* the limitations period began to run at the time the employee was allegedly discharged in violation of Title VII and was not restarted when the employer subsequently refused the employee's request to restore

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[12] Indeed, seniority systems and salary may merge because under some employment contracts "earnings are * * * to some extent a function of seniority." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 767 (1976).

[13] This Court's more recent decision in *Florida* v. *Long,* No. 86-1685 (June 23, 1988), also does not support the court of appeals' decision in this case. Current seniority rights, like current salary payments, relate to "work presently performed" (slip op. 15). They are not akin to the pension plan at issue in *Florida* v. *Long,* which, "funded on an actuarial basis, provides benefits fixed under a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits" (slip op. 15).

seniority rights she would have accrued had she remained employed instead of being discriminatorily discharged (431 U.S. at 557-558). Likewise, in *Ricks* the limitations period began to run at the time the employer notified the employee of his denial of tenure and not when, as the "inevitable consequence" of that denial, the employee was later discharged upon completion of a one-year terminal contract (449 U.S. at 256-259).

In this case, however, petitioners' demotions were not merely present consequences of a previous, time-barred discriminatory decision or act. They were instead a direct, present application of AT&T's intentionally discriminatory seniority system, and thus were themselves "unlawful employment practices" capable of triggering the Section 706(e) limitations period. *Evans* differs from this case in that the plaintiff there did not allege that her employer's seniority system was itself discriminatory, but instead urged as the source of the wrong the earlier discriminatory discharge (431 U.S. at 560; see *Bazemore* v. *Friday*, 478 U.S. at 396 n.6). And, while in *Ricks* the employer was, in a manner of speaking, applying its prior tenure decision in subsequently discharging the employer, the latter action was, unlike the demotion in this case, the "inevitable[ ] consequence" of the prior decision (449 U.S. at 257-258). Hence, the announcement of the tenure denial in *Ricks* also amounted to formal prior notification of termination of his employment and, for that reason, triggered the running of Title VII's limitations period. Cf. *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (footnote omitted) (limitations period begins to run in a Section 1983 action based on unlawful employment discrimination at the time "the operative decision was made—and notice given—in advance of a designated date on which employment terminated").[14] By contrast, AT&T's announcement of its new

[14] We assume that petitioners did not receive formal prior notification of their imminent demotion prior to the demotion itself. If they did, the limitations period might be deemed to have commenced at that earlier time. See *Heiar* v. *Crawford County*, 746 F.2d 1190, 1194 (7th Cir. 1984) (While "specific notice of termination * * * starts the * * * statute of limitations running, it does not follow that the notice an employee receives when he is first hired would also set the statute to run; it surely would not.").

seniority policy in this case did "not abundantly forewarn[ ]" petitioners (449 U.S. at 262 n.16). It did not notify petitioners that they would in fact be demoted based on that policy at some future date certain. It merely created the theoretical possibility of some undefined future adverse consequences.

Nor is there any merit in either the court of appeals' (Pet. App. 8a) or respondent AT&T's suggestion (Br. in Opp. 5-7) that Section 706(e) should be applied more strictly where the challenge is to the lawfulness of a seniority system because seniority systems are accorded special status in Title VII. Section 706(e) nowhere provides that challenges to seniority systems are governed by a different limitations period than other types of discrimination claims. Moreover, Section 703(h), which is the only provision in Title VII that identifies seniority systems for special treatment, does not speak, explicitly or implicitly, to limitations issues (see 42 U.S.C. 2000e-2(h)). It simply provides that differences in treatment that would otherwise be unlawful under Title VII are lawful where they are "pursuant to a bona fide seniority * * * system * * * provided that such differences are not the result of an intention to discriminate" (*ibid.*).[15]

Unlike AT&T, we do not believe that the legal effect of Section 703(h) is to require that any challenge to a seniority plan under Title VII must be brought, at most, within 300 days of the plan's adoption.[16] Section 703(h) requires that the employee in-

[15] The court of appeals, unlike AT&T, never relied on Section 703(h) to support its ruling.

[16] Indeed, as the court of appeals recognized (Pet. App. 8a), such a view leads to nonsensical results. An individual injured by a seniority system adopted long before he became employed by the company would have no standing to complain until after his claim was time-barred. Seniority systems, however discriminatory in purpose and effect, would operate with impunity, immune from legal challenge, just 300 days after being put into effect, as would all of those enacted before the adoption of Title VII. This Court's decisions, however, reflect a quite different view of the import of Section 703(h). See, *e.g.*, *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 69-70 (1982) ("The adoption of a seniority system which has not been applied would not give rise to a cause of action. A discriminatory effect would arise only when the system is put into operation and the employer 'applies' the system. Such application is not infirm under § 703(h) unless it is accompanied by a dis-

clude in his proof of unlawful discrimination a showing "of actual intent to discriminate on * * * the part of those who negotiated or maintained the system." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 65, 69-70 (1982).[17] It does not suggest that only the adoption of the seniority system, as distinguished from its specific applications to define employee rights, can be an "alleged unlawful employment practice" that triggers the running of Section 706(e)'s limitations period. Indeed, Section 703(h) does not define what is unlawful under Title VII in the first instance at all. It simply provides that "[n]otwithstanding any other provision of [Title VII]," certain employment practices

criminatory purpose."); *United Air Lines, Inc.* v. *Evans*, 431 U.S. at 560 (Section 703(h) "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory."); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 761 (1976) ("[T]he thrust of [Section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act."). Nor can we suppose that Congress intended such a harsh result, particularly in Title VII where this Court has recognized "that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes" (*Delaware State College* v. *Ricks*, 449 U.S. at 262 n.16) and "the difficulty of fixing an adoption date" (*American Tobacco Co.* v. *Patterson*, 456 U.S. at 76 n.16).

[17] AT&T's erroneous contention (Br. in Opp. 7) that the court of appeals' decision in this case is "compelled" by this Court's decision in *American Tobacco Co.* v. *Patterson, supra*, rests on a mischaracterization of the Court's opinion in that case. The Court in *American Tobacco Co.* found that, "taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that '[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act' discriminatory impact" (456 U.S. at 75-76 (emphasis and brackets in original), quoting *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 348 n.30 (1977) (emphasis added)). AT&T omits the Court's critical qualification that the seniority system must be "bona fide." The Court's statement does not "compel" a particular result in this case because petitioners assert that AT&T's seniority system was adopted with a discriminatory intent and, hence, is not "bona fide" within the meaning of Section 703(h).

shall *not* be unlawful.[18] In this case, therefore, Section 703(h) does not shift the focus of petitioners' discrimination claim away from its assertion that AT&T's *current* operation of the plan (in demoting petitioners pursuant to that plan) constitutes a present violation of Title VII.[19]

Finally, there is likewise no merit in respondent AT&T's implicit suggestion that its seniority policy should be separated into two distinct parts in considering the timeliness of

[18] Indeed, Section 703(h) does not even require an employee to show that a seniority system was adopted with discriminatory intent. It is well settled that a seniority system loses its exemption under Section 703(h) if it is either adopted *or maintained* for discriminatory reasons. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 355-356; *Pullman-Standard* v. *Swint*, 456 U.S. at 289.

[19] While proof of AT&T's discriminatory intent at the time its seniority plan was adopted or maintained is necessary in order to overcome the Section 703(h) defense, it is not alone sufficient to establish petitioners' claim that the seniority plan amounts to a present violation of Title VII. Cf. *Bazemore* v. *Friday*, 478 U.S. at 396-397 n.6, 402; *Hazelwood School District* v. *United States*, 433 U.S. 299, 309-310 & n.15 (1977). For this reason, AT&T's reliance (Br. in Opp. 7) on *International Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960) is misplaced. In *International Machinists*, the Court held that a claim of unfair labor practice based on the enforcement of a clause in a collective bargaining agreement was untimely under the National Labor Relations Act, 29 U.S.C. 160(b), because the exclusive ground for the clause's asserted illegality was an error in its execution and challenges to the execution itself were no longer timely. The Court explained that "the use of the earlier unfair labor practice * * * serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice" (362 U.S. at 417). In this case, however, petitioners have not sought "to cloak with illegality that which was otherwise lawful." Petitioners instead were simply overcoming a possible defense to their claim based on Section 703(h), and—as we understand them—contend only that "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period" (362 U.S. at 416). Hence, in this case, unlike *International Machinists*, the contractual provision being challenged is not "wholly benign" and the evidence of AT&T's motive in adopting and maintaining the seniority plan is simply evidence deemed necessary by Congress to prove "the true character" of the plan's current operation (*id.* at 416-417 (footnote omitted)).

a Title VII claim: (1) a rule that the seniority of testers will be decided by service as a tester, not plant-wide service; and (2) a rule that employees will be entitled to certain benefits and the avoidance of certain burdens according to their seniority. AT&T argues, in effect, that petitioners cannot rely on the date of their demotions to support the timeliness of their charges because the only seniority rule applied by AT&T in demoting petitioners was the second rule, while petitioners' discrimination challenge is confined to the lawfulness of the first seniority rule, which was adopted and applied to petitioners at much earlier dates. There is no more merit to this argument, however, than there would have been to an analogous contention in *Bazemore* that each weekly paycheck is not an actionable wrong under Title VII because it is simply the product of the application of a second, wholly benign, discrete rule—that individuals would be paid salaries pursuant to the salary structure—while the employees' discrimination charge focussed on the salary structure itself, which had been adopted at an earlier time. In neither instance is the so-called second aspect of the employer's policy truly separable from the admittedly discriminatory portion of the policy, because in each case the second necessarily incorporates and applies the substance of the first.[20]

2. We also agree with petitioners that there is a conflict in the circuits. As the First Circuit recently explained in the course of sharply criticizing the Seventh Circuit's decision in this case, "[m]ost circuit courts have * * * rejected [its] analysis. They have reasoned, instead, that the application of a discriminatory system to a particular substantive decision (e.g., to promote, demote, fire, or award benefits) constitutes an independent discriminatory act which can trigger the commencement of the statute of limitations." *Johnson* v. *General Electric*, 840 F.2d 132, 135 (1st Cir. 1988).[21]

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[20] In contrast, the seniority policy at issue in *Evans* was wholly benign and distinct from the employer's prior discriminatory discharge of the employee.

[21] See, *e.g.*, *Furr* v. *AT&T Technologies, Inc.*, 824 F.2d 1537, 1543 (10th Cir. 1987) (systematic company policy restricting promotions; Age Discrimination in Employment Act (ADEA)); *Abrams* v. *Baylor College of Medicine*, 805 F.2d 528, 532-533 (5th Cir. 1986) (policy restricting assignments; Title VII); *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211, 219 (3d Cir. 1983) (policy restricting layoff benefits; ADEA), cert. denied, 469 U.S. 820 (1984); *Crosland* v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 211-212 (4th Cir. 1982) (policy restricting pension plan benefits; Title VII); *McKenzie* v. *Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982) (policy restricting promotions; Title VII); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 924-925 (9th Cir.) (systematic discrimination with respect to assignments and promotions; Title VII), cert. denied, 459 U.S. 971 (1982); *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981) (giving and using discriminatory hiring examination; Title VII), cert. denied, 455 U.S. 988 (1982); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743-744 (8th Cir. 1980) (discriminatory pay and denial of promotions as evidenced by discrete acts over a period of time; Title VII).

There is a conflict in the circuits warranting this Court's review, moreover, even if the Seventh Circuit's analysis can, as AT&T suggests (Br. in Opp. 1), somehow be confined "to unique issues presented by seniority systems."[22] As petitioners explain (Pet. 16-20), the Second, Fourth, and Sixth Circuits have, unlike the Seventh Circuit, each treated the application of facially neutral but discriminatory seniority plans as providing the basis for continuing violations of federal employment dis-

[22] A subsequent Seventh Circuit opinion authored by Judge Cudahy, who dissented in that court's decision below (see Pet. App. 10a-11a), also suggests that possibility. In *Torres* v. *Wisconsin Dep't of Health & Social Services*, 838 F.2d 944, 948 n.3 (1988), a Seventh Circuit panel rejected an employer's claim that the plaintiffs' complaints were not timely filed with the EEOC, where plaintiff-employees were challenging a facially discriminatory employer plan adopted in 1980 that restricted certain jobs to women, but did not file charges "until after their demotions, pursuant to the full implementation of the Plan, in September 1982." The court ruled "that the relevant discriminatory act was the Plan's implementation and the plaintiffs' resulting demotions in 1982. The plaintiffs' status * * * was not directly affected by the mere adoption of the Plan in 1980, nor were their future demotions assured at that time" (*ibid.*). The court preceded a cite to its prior decision in this case with a "But, cf." signal and intimated that its holding there was confined to a " 'narrow' set of cases involving 'facially-neutral but discriminatory seniority system[s]' " (*ibid.*, quoting 827 F.2d at 167 (Pet. App. 9a)). The Seventh Circuit has since vacated its opinion in *Torres* and agreed to hear the case en banc. See 838 F.2d at 957-958. There is no indication, however, that the full court agreed to rehear the case in order to address the timeliness issue.

crimination law. See *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 646 (2d Cir. 1985) ("[T]he alleged discriminatory violations in the present case must be classified as continuous ones, giving rise to claims accruing in favor of each plaintiff on each occasion when the merged seniority list was applied to him."), cert. denied, 474 U.S. 1109 (1986) ; *Patterson* v. *American Tobacco Co.*, 634 F.2d 744, 751 (4th Cir. 1980) ("[C]ontinuing" violations of Title VII caused by the application of an employer's discriminatory seniority system were "not barred by failure to have challenged at its inception the policy which gave continuing rise to them."), vacated on other grounds, 456 U.S. 63 (1982) ; *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978) ("[T]he adoption of a seniority system * * * constitutes a continuing violation * * * as long as that system is maintained by the employer. An employee's cause of action for an alleged act of * * * discrimination caused by a discriminatory seniority system, does not accrue until his employment opportunities are adversely affected by the application to him of the provisions of that seniority system."), cert. denied, 441 U.S. 906 (1979).[23]

Contrary to respondent AT&T's submission (Br. in Opp. 8-9), the force of this circuit conflict is not dissipated by any meaningful distinction that can be made between the rulings of the Second, Fourth, and Sixth Circuits and the Seventh Circuit's decision in this case. To be sure, both *Cook* and *Morelock* involved allegations of age discrimination under the Age Discrimination in Employment Act (ADEA) and not, as in this case, gender discrimination under Title VII, but as this Court has repeatedly noted, "the filing provisions of the ADEA and Title VII [are] 'virtually in haec verba,' the former having been patterned after the latter." *EEOC* v. *Commercial Office Products Co.*, slip op. 15 (quoting *Oscar Mayer & Co.* v. *Evans*, 441

[23] The Seventh Circuit in this case implicitly acknowledged that its ruling conflicted with the Fourth Circuit's decision in *American Tobacco Co.*, which it cited as supporting petitioners' contention "that the continued application of any intentionally discriminatory seniority system constitutes a continuing violation of Title VII" (Pet. App. 7a).

U.S. 750, 755 (1979)).[24] Hence, the circuit courts' conflicting construction of these provisions in Title VII and the ADEA present a circuit conflict warranting further review.

Nor is there any persuasive reason to expect that any of these other circuits might reconsider their prior rulings in light of intervening developments. Contrary to AT&T's suggestion (Br. in Opp. 8), the Fourth Circuit's ruling in *American Tobacco* that the application of a discriminatory seniority system constituted a "continuing" violation of Title VII was not in any manner "premised" or otherwise dependent on its other ruling in that case that "Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems" (634 F.2d at 749). Indeed, the two rulings were made with respect to two different seniority systems—a pre-Act seniority system and a post-Act system of lines of progression. The Fourth Circuit first concluded that Section 703(h) did apply to the pre-Act seniority system, and remanded to the district court for further fact-finding (see 634 F.2d at 747, 750). The court of appeals then concluded that the employees' challenge to that system was not time-barred because the system constituted a "continuing violation" (*id.* at 751). It is that holding that conflicts with the Seventh Circuit's ruling here. The Fourth Circuit's conclusion that Section 703(h) did not apply to seniority systems adopted after the effective date of the Act applied only to the post-Act lines of progression also at issue in the case (see 634 F.2d at 748-750); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 67-68 & n.2 (1982). This Court reversed only the latter holding (see *id.* at 68-77). Hence, this Court's subsequent reversal of the Fourth Circuit's construction of Section 703(h) (see 456 U.S. at 68-77) provides no basis for speculating that the Fourth Circuit might now recon-

[24] The Second Circuit in *Cook* stressed (771 F.2d at 644) the common features shared by Section 703(h) of Title VII and the ADEA's analogous provision governing seniority systems (§ 4(f)(2)). See 29 U.S.C. 623(f)(2) ("It shall not be [an] unlawful [practice] to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of th[e] [ADEA].").

sider its ruling on the timeliness issue. As discussed above, moreover, we find unpersuasive AT&T's argument that the meaning of Section 703(h) bears on the timeliness issue and expect that the Fourth Circuit would be equally unreceptive to that contention.

We also find unconvincing AT&T's contention (Br. in Opp. 9) that the Sixth Circuit might reconsider its decision in *Morelock* in light of this Court's subsequent decision in *Ricks*. As described above, *Ricks*, is distinguishable from the present case because while the denial of tenure provided the employee in *Ricks* with formal notification of the "inevitable" termination of his employment, neither the adoption of the seniority plan nor petitioners' becoming subject to it provided them with formal notification of their subsequent demotion. There is, for that reason, no grounds for supposing that *Ricks* would (or should) persuade the Sixth Circuit to reconsider its ruling in *Morelock*.[25]

We do not share respondent AT&T's view that the inconsistent statements in both *Cook* and *Morelock* should be given no significance by this Court on the ground that they are mere "dictum" (Br. in Opp. 9). Both courts squarely addressed the same basic legal issue presented in this case and expressly described their conclusions of law as holdings (see 771 F.2d at 646; 586 F.2d at 1103). That the Seventh Circuit's rationale in this case would have led the Second Circuit in *Cook* to the same result it actually reached does not alter the fact that it rested its judgment on starkly conflicting reasoning. Nor does the fact that the Sixth Circuit in *Morelock* ultimately upheld the employer's claim that his seniority policy was lawful convert that court's flat rejection of the employer's threshold timeliness defense into mere dictum. As the employer argued in that case, had the court accepted that threshold procedural defense, it would have "eliminate[d] the necessity for th[e] Court to reach the merits of th[e] appeal" (586 F.2d at 1102).

3. Finally, review is warranted because the question presented by the petition is important. Congress "ordained that its

[25] *Morelock*, like this case and unlike *Ricks*, involved a challenge to the application of an allegedly discriminatory seniority system.

policy of outlawing * * * discrimination should have the 'highest priority' " (*Franks* v. *Bowman Transportation Co.*, 424 U.S. at 763 (citations omitted), quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)) and, as this Court has repeatedly recognized, "[s]eniority rights are of 'overriding importance' in collective bargaining" (*American Tobacco Co.* v. *Patterson*, 456 U.S. at 76 (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)); see *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 766 (citation omitted) ("Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation.")). This case concerns the intersection of these two important rights of an employee and the relationship of Sections 703(h) and 706(e) of Title VII.

The decision of the court of appeals warrants review because it threatens these important employee rights and the employment relationship. As described by Judge Cudahy in dissent in this case (Pet. App. 10a), employees would under this rule be required to bring suit at a time when "they had not really been injured and might never be injured." The likely upshot of the Seventh Circuit's rule will therefore be, on the one hand, the proliferation within that jurisdiction of unnecessary and premature lawsuits against employers to the detriment of the employer/employee relationship and, on the other hand, the dismissal of any suit by an employee who, like each of the petitioners in this case, awaits the development of a concrete injury prior to taking the drastic action of suing his employer.[26]

We cannot estimate what proportion of the millions of employees who are subject to seniority systems will be affected by the court of appeals' ruling either within the jurisdiction of the Seventh Circuit, or in other circuits, should any of them adopt a similar construction of Title VII. The EEOC has con-

[26] As Judge Cudahy also explained (Pet. App. 10a), the majority's rule will not even ably serve the one objective it sought to promote – prompt resolution of challenges to seniority systems – because under the majority's rule (unlike AT&T's), future employees are "not barred by the statute of limitations and * * * can bring challenges to tester seniority in the future."

sidered the date of the application of the allegedly discriminatory seniority system as the most logical date for the running of Section 706(e)'s limitations period, and has not heretofore compiled data regarding either the date on which a discriminatory seniority plan was first adopted or the date on which the complaining employee first became subject to the plan now being challenged.[27]

Although we have not undertaken an empirical study, we expect that the relatively low number of decisions raising this question in the seniority context under either Title VII or the ADEA can be similarly explained. Unlike AT&T and the Seventh Circuit in this case, employers have most likely assumed that where, as in this case, the employee was claiming that the seniority system was itself discriminatory, the limitations period logically began to run on the date that they allegedly injured the employee through the application of their seniority systems.[28] Until the court of appeals' ruling in this case, every court to reach the issue had adopted that very view. The defense will undoubtedly now be increasingly raised in the aftermath of the Seventh Circuit's ruling, but because of the existing circuit conflict there is no need to await further development of the issue in the lower courts.

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[27] For the reasons described by this Court in *American Tobacco Co.* v. *Patterson*, fixing an adoption date is often a difficult task (456 U.S. at 76 n.16).

[28] For instance, as described by petitioners (Pet. 31-32 & n.18), in at least two cases previously before this Court, it seems that neither employer questioned the timeliness of Title VII charges challenging the lawfulness of seniority plans where the plaintiff-employee had first become subject to the plan long before the bringing of the lawsuit, which instead was filed following injury caused by the plan's operation. See *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 601-602, 610-611 (1980); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 138-143 (1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA A. LORANCE, ET AL., PETITIONERS

v.

AT&T TECHNOLOGIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether in the case of an employment discrimination charge alleging that the complainant was demoted pursuant to a seniority system that was adopted for a discriminatory purpose and continues to operate with discriminatory effect, the limitations period established by Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), begins to run when the employee is first notified of the demotion, rather than when the employer first adopted the seniority system or when the employee first became subject to it.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

This case concerns the timeliness of employment discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, where the basis of the charge is an employee's demotion resulting from the application of an allegedly discriminatory seniority system. The EEOC is the federal agency primarily responsible for administering federal fair employment statutes in the private sector, including Title VII, and both the Attorney General and the EEOC have substantial responsibility for enforcement of Title VII (see 42 U.S.C. 2000e-5(a) and (f)(1)). In addition, the federal government is covered by Title VII in its capacity as the nation's largest employer (42 U.S.C. 2000e-16). Hence, the resolution of the issue presented in this case will directly

affect the government's enforcement responsibilities and could also affect the government's compliance obligations. At the Court's invitation, the Solicitor General filed a brief on behalf of the United States and the EEOC as amici curiae in support of the petition for a writ of certiorari.

STATEMENT

1. Petitioners Patricia A. Lorance, Janice M. King, and Carol S. Bueschen are hourly wage employees at the Montgomery Works plant of respondent AT&T Technologies, Inc. (AT&T), in Aurora, Illinois.[1] They are also members of respondent Local 1942, International Brotherhood of Electrical Workers, AFL-CIO (Union). Pet. App. 4a. Petitioners Lorance and Bueschen have been employed at the plant by AT&T since 1970, and petitioner King commenced work there in 1971 (*ibid.*). At that time, promotions and demotions at the plant were based on plant-wide seniority (*ibid.*).

Most hourly wage jobs at the plant are semi-skilled jobs and have traditionally been filled by women (Pet. App. 15a). Among the highest paying hourly wage jobs at the plant are "testers" jobs (*id.* at 4a, 15a). Tester positions were traditionally filled by men who were either promoted from among the relatively few men in the lower paying wage jobs or hired directly into tester positions (*id.* at 15a). All three petitioners were originally employed in nontester positions.

By 1978, an increasing number of women obtained tester positions based on their plant-wide seniority (Pet. App. 4a). In July 1979, AT&T and the Union modified

[1] Because the courts below awarded summary judgment to respondents based solely on the untimeliness of the charge, our statement, like those contained in the lower courts' opinions, is based on the facts alleged in petitioners' complaint.

the collectively bargained seniority system applicable to the Montgomery Works plant to provide that promotions and demotions of testers with less than five years of tester service, who have not completed a training program for the tester job, would be governed by seniority as a tester rather than plant-wide seniority (*ibid.*; Compl. ¶ 17 (J.A. 21)); plant-wide seniority continued to govern all other matters, including, for example, lay-offs and determination of benefits (Pet. App. 16a). The new seniority plan was known as the "Tester Concept" (*id.* at 4a).[2] Petitioner Lorance was a tester at tne time the seniority system was changed (*id.* at 5a). Petitioners Bueschen and King became testers in 1980 (*ibid.*).

In late 1982, AT&T began a reduction in force and, based on its new seniority system, demoted all three petitioners (Pet. App. 5a). Petitioners Lorance and King were demoted from senior testers to junior testers and petitioner Bueschen was demoted to a nontester position (*ibid.*).[3] Petitioners would not have been demoted if AT&T had implemented the reduction in force on the basis of each petitioner's plant-wide seniority (*ibid.*). Within 300 days of their demotions, petitioners filed administrative charges with the Equal Employment Opportunity Commission (EEOC) claiming that their demotions violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[4] The EEOC determined that there

[2] The Union approved the new plan by a vote of ninety votes to sixty, which was approximately the ratio of men to women voting (Pet. App. 5a).

[3] King was downgraded on August 23, 1982. Lorance and Bueschen were downgraded on November 15, 1982, and Bueschen was downgraded a second time on January 23, 1984. Pet. App. 17a.

[4] Petitioners Lorance and Bueschen filed charges with the EEOC on April 13, 1983, and petitioner King filed her charge on April 21, 1983 (Pet. App. 18a).

was not reasonable cause to believe that petitioners' allegations were true and, accordingly, issued them right-to-sue letters (Pet. App. 5a).

2. Petitioners subsequently brought this lawsuit in the United States District Court for the Northern District of Illinois pursuant to Section 706(f) of Title VII, 42 U.S.C. 2000e-5(f).[5] In their complaint, petitioners allege that respondents AT&T and Union changed the seniority system in 1979 "in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs" (Compl. ¶ 14 (J.A. 20)). They also allege that application of this provision has had the effect of favoring male testers over female testers (*id.* ¶ 18 (J.A. 21-22); see also *id.* ¶ 6(f) (J.A. 15-16)).

The district court granted respondent AT&T's motion for summary judgment and, sua sponte, also granted summary judgment in favor of respondent Union (Pet. App. 12a-33a).[6] The court agreed with AT&T that petitioners' challenge was time-barred because they had failed to file their charges with the EEOC within the applicable limitations period established by Section 706(e) of Title VII (42 U.S.C. 2000e-5(e)).[7] The court ruled that the limitations period started to run when each petitioner first became subject to the new seniority policy as a tester (Pet. App.

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[5] Petitioners brought this suit as a class action, but the district court has yet to rule on their motion to certify the class (see Pet. App. 6a n.1).

[6] The district court adopted the recommendation of the magistrate that summary judgment should be entered in favor of all respondents (Pet. App. 34a-50a).

[7] AT&T argued below that Title VII's 180-day limitations period applies rather than its 300-day limitations period, but the lower courts did not address the issue because under their analysis petitioners' charges were untimely in either event (see Pet. App. 6a n.2, 19a-20a n.3).

26a, 32a). In doing so, it rejected petitioners' contention that the limitations period commenced when they were demoted in 1982 (*id.* at 25a-27a), and likewise rejected AT&T's claim, which the magistrate had accepted (*id.* at 43a-44a), that the limitations period commenced for all petitioners in 1979 when AT&T first adopted the seniority policy (*id.* at 27a-31a). Because, as the court found, each petitioner filed her charge more than 300 days after the time each first became subject to the new policy as a tester, the court concluded that petitioners' complaint should be dismissed since none had timely filed her charge with the EEOC (*id.* at 32a-33a n.6).

3. A divided court of appeals affirmed (Pet. App. 3a-11a). The court agreed that petitioners' argument was "logically appealing," but concluded that it was "compelled to reject it" because "[i]f we were to hold that each application of an allegedly discriminatory seniority system constituted an act of discrimination, employees could challenge a seniority system indefinitely" (*id.* at 8a). Like the district court, however, the court of appeals also rejected AT&T's argument that the "adoption" of the seniority system constituted the relevant act that triggered the running of Title VII's limitations period (*ibid.*). According to the court, such a rule would "encourage needless litigation" by employees not even yet formally subject to the seniority plan and would also "frustrate the remedial policies that are the foundation of Title VII" by providing future employees with no recourse against a seniority system they thought discriminatory (*ibid.*).

The court of appeals determined that to strike a "balance that reflects both the importance of eliminating existing discrimination, and the need to insure that claims are filed as promptly as possible," the rule should be that "the relevant discriminatory act that triggers the period of

limitations occurs at the time an employee becomes subject to a facially-neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory" (Pet. App. 9a). The court concluded that because affidavits submitted by petitioners established that they knew they were subject to the new seniority policy on the day they became subject to it as testers, the limitations period commenced on that date. Hence, the court found, petitioners' charges were not timely filed with the EEOC because they were filed two to three years after each petitioner was first subject to the new policy, which is beyond the 300-day limitations period provided by Title VII (*ibid.*). See note 4, *supra*.[8]

Judge Cudahy dissented (Pet. App. 10a-11a). He agreed that the majority's policy concerns were "important," but contended that they "find dubious application in the result here" (*id.* at 11a). He explained that the majority's rule would not achieve its goal of preventing suits against seniority plans adopted long ago, but instead would merely limit the plaintiffs who could maintain a lawsuit to those more recently hired (*id.* at 10a). Judge Cudahy also faulted the majority for announcing a legal rule that would require employees to bring premature lawsuits. When an employee is first subject to a seniority policy, the dissent explained, he has not yet been injured by it and does not know whether he ever will be. *Ibid.*[9]

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[8] The court described (Pet. App. 9a) its holding as "a narrow one," noting that the relevant act of discrimination may be different where, unlike this case, the seniority policy is facially discriminatory or the employer exercises discretion provided by the plan in a discriminatory fashion.

[9] The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc (Pet. App. la-2a). Judges Easterbrook, Ripple, and Cudahy voted in favor of rehearing en banc (*id.* at 2a n.*).

SUMMARY OF ARGUMENT

Under Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), the limitations period commences to run on the date on which "the alleged unlawful employment practice occurred." In our view, where, as in this case, employees claim that they were demoted pursuant to a discriminatory seniority system, the "unlawful employment practice occurred" on the date that the employees were first notified of their demotions. In this respect, challenges to the application of discriminatory seniority systems are like challenges to other continuing discriminatory employment policies under Title VII. The limitations period is measured from the last asserted application of the discriminatory policy.

Neither *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), nor *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), suggests otherwise. Those cases stand for the proposition that Title VII's limitations period is not measured from the date of the application of employment policies (including seniority systems) that merely perpetuate the consequences of prior discrimination, but are not themselves discriminatory. In this case, petitioners claim that the seniority system is itself discriminatory, and thus its application is in fact actionable.

Contrary to respondent AT&T's contention, moreover, Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), does not mandate the application of more restrictive statute of limitations principles to challenges to the application of discriminatory seniority systems. Section 703(h) simply requires an employee to include in his proof of unlawful discrimination a showing of actual intent to discriminate on the part of those who negotiated or maintained the system. It does not suggest that only the adoption of the seniority system, as distinguished from its specific applica-

tions to define employees rights, can be an "alleged unlawful employment practice" that triggers the running of Section 706(e)'s limitations period. In this case, therefore, Section 703(h) does not shift the focus of petitioners' discrimination claim away from respondent AT&T's current application of its seniority system.

Finally, the date on which the application of an allegedly discriminatory seniority system has a concrete adverse impact on the employee is the only sensible date on which to commence Title VII's limitations period. Respondent AT&T's view that the limitations period should be measured from the date of a seniority system's adoption cannot be correct. Under that view, seniority systems, however discriminatory in purpose and in effect, would operate with impunity, immune from legal challenge under Title VII, just a few months after their adoption. Nor is the court of appeals' alternative suggestion—measuring the limitations period from the date the employee first became subject to the allegedly discriminatory seniority system—any more sensible. Under that view, as under AT&T's, employees would be required to take the drastic action of suing their employer before they could know if they would ever suffer any concrete injury from operation of the seniority system.

ARGUMENT

IN A TITLE VII CHALLENGE TO THE APPLICATION OF AN ALLEGEDLY DISCRIMINATORY SENIORITY SYSTEM, THE "UNLAWFUL EMPLOYMENT PRACTICE" THAT TRIGGERS THE COMMENCEMENT OF SECTION 706(e)'S LIMITATIONS PERIOD OCCURS ON THE DATE THE EMPLOYER APPLIES THE SENIORITY SYSTEM TO THE EMPLOYEE AND NOT ON THE DATE THE EMPLOYER ADOPTS THE SYSTEM OR THE EMPLOYEE FIRST BECOMES SUBJECT TO THE SYSTEM.

Section 706(e) of Title VII provides that where there is a state fair employment practice agency with overlapping jurisdiction, an employment discrimination charge must be filed with the EEOC within 300 days "after the alleged unlawful employment practice occurred" (42 U.S.C. 2000e-5(e)).[10] If the unlawful practice at issue in this case "occurred" on the date of petitioners' demotions, their charges would be timely because they were filed with the

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[10] As previously noted (see note 7, *supra*), AT&T argued below that the applicable limitations period under Section 706(e) is 180 (not 300) days in this case because, although there is a state fair employment practice agency with overlapping jurisdiction, petitioners "failed to file timely charges with the applicable state 'deferral' agency" (Appellee AT&T C.A. Br. 12 n.10). The lower courts did not address this question because the resolution of that issue would not have affected their disposition of the case (see Pet. App. 6a n.2, 19a-20a n.3), and respondent has not reasserted that argument before this Court (see Br. in Opp. 2). We note, however, that to the extent the argument rests on an allegation that state proceedings were not timely instituted under state law, it cannot survive this Court's recent decision in *EEOC* v. *Commercial Office Products Co.*, No. 86-1696 (May 16, 1988), slip op. 14 ("state time limits for filing discrimination claims do not determine the applicable federal time limit"). In any event, the question whether the 180 or 300-day limitations period applies does not preclude review of the question presented here because petitioners Lorance and Bueschen filed their charges with the EEOC within 180 days after their demotions (see notes 3, 4, *supra*).

EEOC within 300 days thereafter (see notes 3, 4, *supra*). If, on the other hand, the unlawful practice occurred, as respondent AT&T contends, only at the time when AT&T first adopted the seniority policy or, as the court of appeals held, when it was made known to each petitioner that her seniority rights would be determined under the new policy, then petitioners' charges would be time-barred because they were not filed within 300 days of either of those events. Hence, "[d]etermining the timeliness of [their charges] * * * requires us to identify precisely the 'unlawful employment practice' of which [they] complain[]." *Delaware State College* v. *Ricks,* 449 U.S. 250, 257 (1980).

A. The Limitations Period for Filing a Title VII Charge Commences Each Time a Discriminatory Policy Is Used to Make an Employment Decision.

1. Petitioners allege that respondent AT&T violated Title VII by demoting them pursuant to a seniority policy that, while facially neutral, was adopted with a discriminatory purpose and has the effect of favoring male testers over female testers. We agree with petitioners that their charges were timely filed because the date of their demotions was the date on which this "alleged unlawful employment practice occurred," within the meaning of Section 706(e). Each application of a discriminatory seniority system to alter an employee's employment status, like each application of a discriminatory salary structure to determine an employee's weekly pay check, "is a wrong actionable under Title VII." *Bazemore* v. *Friday,* 478 U.S. 385, 395 (1986).[11] It is no bar to the bringing of a challenge

[11] Indeed, seniority systems and salary structures may both play a part in shaping the same challenged employment action, because under some employment contracts "earnings are * * * to some extent a function of seniority." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 767 (1976).

to the *current application* of an allegedly discriminatory seniority policy that previous applications of the same policy are not now subject to legal challenge under Title VII, either because the limitations period has expired or because Title VII was not then in effect. Cf. *id.* at 395-396 n.6. As this Court explained in *Bazemore,*[12] an employment policy or practice "that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and *to the extent an employer continued to engage in that act or practice,* he is liable under that statute" (*id.* at 395 (emphasis supplied)).[13]

[12] In *Bazemore,* this Court held that each pay check issued pursuant to a discriminatory salary structure constituted a present Title VII violation, even if the current pay disparities had their origins in pre-Act discrimination. In that case, prior to the enactment of Title VII, the Agricultural Extension Service of the State of North Carolina "maintained two separate, racially-segregated branches and paid black employees less than white employees" (478 U.S. at 394). After the Service merged its black and white branches into a single organization in 1965, " '[s]ome pre-existing salary disparities continued to linger on,' and * * * these disparities continued after Title VII became applicable to the Extension Service in March 1972" (*ibid.*). This Court reversed the court of appeals' conclusion that the current salary disparities did not violate Title VII because they merely reflected the employer's failure to eliminate entirely the vestiges of prior discrimination (*ibid.*).

[13] The Section-by-Section Analysis of the 1972 Amendments to Title VII makes clear that the limitations period in Section 706(e) is to be measured from the final discriminatory event (118 Cong. Rec. 7167, 7564 (1972)):

> Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court

To similar effect is this Court's decision in *Havens Realty Corp.* v. *Coleman,* 455 U.S. 363 (1982), a case brought pursuant to the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, challenging a continuing pattern, practice, and policy of unlawful racial steering in real estate sales. In *Havens Realty,* the Court concluded that the 180-day limitations period for a judicial enforcement action then established by Section 812(a) of the Fair Housing Act (42 U.S.C. 3612(a)) did not begin until the "last asserted occurrence of that practice" (455 U.S. at 381).[14] "Where the challenged violation is a continuing one," the Court explained (455 U.S. at 380), "the staleness concern disappears." Where, as in this case, the "last asserted occurrence" of a discriminatory policy is also the only application of that policy alleged by the plaintiff, *Havens Realty* seems clearly to indicate that the statute begins to run from that event.[15]

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decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which was [*sic*] determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected * * *.

[14] Compare 42 U.S.C. 2000e-5(e) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * *.") with 42 U.S.C. 3612(a) ("A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred * * *.").

[15] The Fair Housing Amendments Act of 1988 made significant changes in the Fair Housing Act of 1968, including establishment of an administrative enforcement mechanism and extension of the applicable statute of limitations. See Pub. L. No. 100-430, 102 Stat. 1619, § 8, 102 Stat. 1625, 1633. The 1988 legislation also reaffirmed

Finally, decisions of this Court raising analogous limitations issues but arising in nondiscrimination contexts likewise support our view. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery, Corp.,* 392 U.S. 481, 502 n.15 (1968) ("Although Hanover could have sued [under the Sherman Act] in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955."); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 338 (1971) ("In the context of a continuing conspiracy to violate the antitrust laws, * * * each time a plaintiff is injured by an act of the defendants[,] a cause of action accrues to him to recover the damages caused by the act and * * *, as to those damages, the statute of limitations runs from the commission of the act.").[16] It is therefore not surprising that, as the First Circuit recently noted in criticizing the Seventh Circuit's decision in this case, other courts of appeals have consistently held "that the application of a discriminatory system to a particular substantive decision (*e.g.*, to promote, demote, fire, or award benefits) constitutes an independent discriminatory act which can trigger the commencement of the statute of limitations." *Johnson* v. *General Electric,* 840 F.2d 132, 135 (1st Cir. 1988).[17]

"the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice," by providing that either an agency complaint or a federal court lawsuit "must be filed within one year from the time the alleged discrimination occurred *or terminated.*" H.R. Rep. 100-711, 100th Cong., 2d Sess. 33, 39 (1988) (footnote omitted; emphasis added); see 102 Stat. 1625, 1633.

[16] The limitations periods for suit challenging continuing tortious conduct is similarly measured. See Restatement (Second) of Torts § 899 comment c (1979); 1 F. Harper, F. James, & 0. Gray, *The Law of Torts* § 1.30, at 120-121 (2d ed. 1986); *Gross* v. *United States,* 676 F.2d 295, 300 (8th Cir. 1982).

[17] See *e.g., EEOC* v. *O'Grady,* No. 87-1996 (7th Cir. Sept. 12, 1988), slip. op. 5 n.7 (mandatory retirement policy; Age Discrimina-

2. Contrary to the court of appeals' decision, this Court's decisions in *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977), and *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980), do not support a different result in this case.[18] In both of those cases, the Court held that the

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tion in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*); *Johnson* v. *General Electric,* 840 F.2d at 135 (promotions; Title VII); *Furr* v. *AT&T Technologies, Inc.,* 824 F.2d 1537, 1543 (10th Cir. 1987) (systematic company policy restricting promotions; ADEA); *Abrams* v. *Baylor College of Medicine,* 805 F.2d 528, 532-533 (5th Cir. 1986) (policy restricting assignments; Title VII); *Cook* v. *Pan American World Airways, Inc.,* 771 F.2d 635, 646 (2d Cir. 1985) (application of intentionally discriminatory seniority system; ADEA), cert. denied, 474 U.S. 1109 (1986); *EEOC* v. *Westinghouse Electric Corp.,* 725 F.2d 211, 219 (3d Cir. 1983) (policy restricting layoff benefits; ADEA), cert. denied, 469 U.S. 820 (1984); *Bartelt* v. *Berlitz School of Languages of America, Inc.,* 698 F.2d 1003, 1004 (9th Cir.) (policy of paying lower wages to female employees; Title VII), cert. denied, 464 U.S. 915 (1983); *Crosland* v. *Charlotte Eye, Ear & Throat Hospital,* 686 F.2d 208, 211-212 (4th Cir. 1982) (policy restricting pension plan benefits; ADEA); *McKenzie* v. *Sawyer,* 684 F.2d 62, 72 (D.C. Cir. 1982) (policy restricting promotions; Title VII); *Williams* v. *Owens-Illinois, Inc.,* 665 F.2d 918, 924-925 (9th Cir.) (systematic discrimination in assignments and promotions; Title VII), cert. denied, 459 U.S. 971 (1982); *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport,* 647 F.2d 256, 274 (2d Cir. 1981) (giving and using discriminatory hiring examination; Title VII), cert. denied, 455 U.S. 988 (1982); *Patterson* v. *American Tobacco Co.,* 634 F.2d 744, 751 (4th Cir. 1980) (application of intentionally discriminatory seniority system; Title VII), vacated on other grounds, 456 U.S. 63 (1982); *Satz* v. *ITT Fin. Corp.,* 619 F.2d 738, 743-744 (8th Cir. 1980) (discriminatory pay and denial of promotions as evidenced by discrete acts over a period of time; Title VII); *Morelock* v. *NCR Corp.,* 586 F.2d 1096, 1103 (6th Cir. 1978) (application of intentionally discriminatory seniority system; ADEA), cert. denied, 441 U.S. 906 (1979).

[18] This Court's more recent decision in *Florida* v. *Long,* No. 86-1685 (June 23, 1988), also does not support the court of appeals' decision in this case. Current seniority rights, like current salary

plaintiffs were not challenging any current discrimination because, the Court explained, employment practices that merely perpetuate the consequences of prior discrimination but are not themselves discriminatory do not constitute actionable wrongs under Title VII. See *Ricks,* 449 U.S. at 257 ("If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment."); *Evans,* 431 U.S. at 558 ("[Plaintiff] has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a nondiscriminatory reason."); see also *Bazemore,* 478 U.S. at 396 n.6 (distinguishing *Evans*) ("Because the employer was not engaged in discriminatory practices at the time the respondent in *Evans* brought suit, there simply was no violation of Title VII.").

In the absence of an allegation of current discriminatory conduct, the Court concluded in both cases that the applicable charge-filing limitations period began to run on the date of a prior, allegedly discriminatory act. Thus, in *Evans,* the limitations period began to run at the time the

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payments, relate to "work presently performed" (slip op. 15). The allocation of employment opportunities pursuant to a seniority system is not akin to the issuance of payments under the pension plan at issue in *Florida* v. *Long,* which, "funded on an actuarial basis, provides benefits fixed under a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits" (*ibid.*). Seniority systems, by contrast, are always subject to change, by renegotiation or other means, and their impact on particular employees is affected by many variable factors, such as increases and decreases in the size of the workforce.

employee was allegedly discharged in violation of Title VII and not when, after she was subsequently rehired, the employer applied the provisions of the seniority system to deny her credit for prior years of service or for years she presumably would have served had she not been discriminatorily discharged (431 U.S. at 557-558). Likewise, in *Ricks,* the limitations period began to run at the time the employer notified the employee of his denial of tenure and not when, as the "inevitable consequence" of that denial, the employee was later discharged upon completion of a one-year terminal contract (449 U.S. at 256-259). "The emphasis is not upon the effects of earlier employment decisions; rather it 'is [upon] whether any present violation exists' " (*id.* at 258, quoting *Evans,* 431 U.S. at 558 (emphasis omitted)).

In this case, however, petitioners' demotions were not merely present consequences of a previous, time-barred discriminatory decision or act. They were instead a direct, discriminatory effect of the application of a seniority system that petitioners allege was adopted with a discriminatory purpose. Hence, the demotions were themselves "unlawful employment practices" capable of triggering the Section 706(e) limitations period.[19] Further-

[19] There is no merit to AT&T's suggestion that petitioners' demotions were not discriminatory acts because they were merely the result of the application of a neutral, general rule that certain benefits and burdens of employment will be determined according to seniority, while the challenged unlawful practice was actually the adoption of an allegedly discriminatory rule that the seniority of testers will be decided by service as a tester. There is no more merit to this argument than there would have been to an analogous contention in *Bazemore* that each weekly pay check is not an actionable wrong under Title VII because it is simply the product of the application of a wholly benign, discrete rule—that individuals would be paid salaries pursuant to the salary structure—while the employees' discrimination charge focussed on the salary structure itself, which had been adopted at an earlier time. In neither instance is the rule that employment decisions are made pursuant to an employer's general policy separable from the discriminatory portion of the policy.

more, unlike the discharge in *Ricks,* petitioners' demotions were not the "inevitable" result of the seniority system's adoption. AT&T's announcement of its seniority policy did "not abundantly forewarn[]" petitioners of their demotions (449 U.S. at 262 n.16). It did not notify petitioners that they would, in fact, ever be demoted based on that policy at some future date. It merely created the theoretical possibility of some undefined future adverse employment consequences.[20]

B. Challenges to the Application of Discriminatorily-Motivated Seniority Systems Are Not Governed By More Restrictive Statute of Limitations Principles Under Title VII

There is no merit in either the court of appeals' (Pet. App. 8a) or respondent AT&T's suggestion (Br. in Opp. 5-7) that an especially strict interpretation of the Section 706(e) limitations period is appropriate for challenges to

[20] In *Ricks,* the announcement of the tenure denial also amounted to formal prior notification of termination of his employment and, for that reason, triggered the running of Title VII's limitations period. Cf. *Chardon* v. *Fernandez,* 454 U.S. 6, 8 (1981) (Limitations period begins to run in a Section 1983 action based on unlawful employment discrimination at the time "the operative decision was made—and notice given—in advance of a designated date on which employment terminated."). We assume that petitioners did not similarly receive formal notification of their imminent demotions prior to the demotions themselves. If they did, the limitations period might be deemed to have commenced at the date of such specific notice. See *Heiar* v. *Crawford County,* 746 F.2d 1190, 1194 (7th Cir. 1984) (While "specific notice of termination * * * starts the * * * statute of limitations running, it does not follow that the notice [of an employment policy] an employee receives when he is first hired would also set the statute to run; it surely would not.").

the application of a seniority system. Section 706(e) nowhere provides that challenges to seniority systems are governed by different limitations rules than other types of discrimination claims. Section 703(h),[21] which is the only provision in Title VII that identifies seniority systems for special treatment, does not address, explicitly or implicitly, the time limits for filing charges.[22] It simply provides that differences in treatment that would otherwise be unlawful under Title VII are lawful where they are "pursuant to a bona fide seniority * * * system * * * provided that such [differences] are not the result of an intention to discriminate" (*ibid.*).

Unlike AT&T, we do not believe that the legal effect of Section 703(h) is to require that any challenge to a seniority plan under Title VII must be brought no more than 300 days after the plan's adoption. Section 703(h) requires that the employee include in his proof of unlawful discrimination a showing "of actual intent to discriminate on * * * the part of those who negotiated or maintained the system." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 65, 69-70 (1982).[23] It does not suggest that only the adop-

[21] See 42 U.S.C. 2000e-2(h) ("[I]t shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system * * * provided that such [differences] are not the result of an intention to discriminate * * *.").

[22] The court of appeals never relied on Section 703(h) to support its ruling.

[23] AT&T's erroneous contention (Br. in Opp. 7) that the court of appeals' decision in this case is "compelled" by this Court's decision in *American Tobacco Co.* v. *Patterson*, *supra*, rests on a mischaracterization of the Court's opinion in that case. The Court in *American Tobacco Co.* found that, "taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that '[s]ection

tion of the seniority system, as distinguished from its specific applications to define employee rights, can be an "alleged unlawful employment practice" that triggers the running of Section 706(e)'s limitations period.[24] Section 703(h) simply provides that "[n]otwithstanding any other provision of [Title VII]," certain employment practices shall *not* be unlawful.[25] Because petitioners have alleged an "intention to discriminate" in the formulation of the seniority system and a current discriminatory effect from the application of that system, the employer conduct they challenge is in no way protected by Section 703(h).[26]

703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act' discriminatory impact" (456 U.S. at 75-76 (emphasis and brackets in original), quoting *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 348 n.30 (1977) (emphasis added)). AT&T omits the Court's critical qualification that the seniority system must be "bona fide." The Court's statement does not "compel" a particular result in this case because petitioners assert that AT&T's seniority system was adopted with a discriminatory intent and, hence, is not "bona fide" within the meaning of Section 703(h).

[24] In fact, it is clear that discriminatory purpose in the adoption of a seniority system is not essential at all to the finding that the plan's application constitutes a violation of Title VII. A seniority system loses its exemption under Section 703(h), and thus violates Title VII, if it is either adopted *or maintained* for discriminatory purposes. *Teamsters*, 431 U.S. at 355-356; *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982).

[25] Indeed, Section 703(h) does not define what is unlawful under Title VII in the first instance at all. It is Section 703(a), 42 U.S.C. 2000e-2(a), that affirmatively sets out those employment practices that are unlawful under Title VII.

[26] AT&T mistakenly relies (Br. in Opp. 7) on *International Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960), to support its contrary view. In *International Machinists*, the Court held that a claim of unfair labor practice based on the enforcement of a clause in a collective bargaining agreement was untimely under the National Labor Rela-

Section 703(h)'s limited legislative history likewise provides no support for AT&T's view of its effect on the running of Title VII limitations periods. As previously recounted by this Court, Section 703(h) was part of the compromise substitute bill fashioned by Senators Mansfield and Dirksen that cleared the way for Title VII's passage. See generally *Teamsters,* 431 U.S. at 350-353; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 758-762 (1976). The legislative history shows that Section 703(h) had the important but limited purpose "to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII" (*Teamsters,* 431 U.S. at 352; see also *Franks,* 424 U.S. at 761). There is no indication in the legislative history that Section 703(h) was intended to have any effect on challenges to non-bona fide seniority systems, including the date on which the limita-

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tions Act, 29 U.S.C. 160(b), because the exclusive ground for the clause's asserted illegality was an error in its execution, and challenges to the execution itself were no longer timely. The Court explained that "the use of the earlier unfair labor practice * * * serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon the earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice" (362 U.S. at 417). In this case, however, petitioners have not sought "to cloak with illegality that which was otherwise lawful." Petitioners instead were simply meeting a possible defense to their discrimination claim based on Section 703(h), and —as we understand it—contend only that "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period" (362 U.S. at 416). Hence, unlike *International Machinists,* the contractual provision being challenged in this case is (like the pay structure at issue in *Bazemore*) not "wholly benign"; it favors male testers over female testers. The evidence of AT&T's motive in adopting and maintaining the seniority plan is therefore simply evidence deemed necessary by Congress, under Section 703(h), to prove "the true character" of the plan's current operation (362 U.S. at 416-417 (footnote omitted)).

tions periods for such challenges would commence to run under Section 706(e). Indeed, in underscoring the legitimacy of challenges to post-Act "use" of non-bona fide seniority systems, the legislative history suggests Congress's understanding that the application of a discriminatory seniority system would itself constitute the "unlawful employment practice" for the purpose of triggering Section 706(e)'s limitations period. See 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Senators Clark and Case) (emphasis added) ("However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the *use* of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.").[27]

Finally, this Court's decisions regarding the meaning of Section 703(h) are consistent with our view. While they do not address the precise issue before the Court, those decisions make clear that a current application of a previously adopted seniority system may sometimes be open to Title VII challenge. See *American Tobacco Co.* v. *Patterson,* 456 U.S. at 69-70 ("The adoption of a seniority system which has not been applied would not give rise to a cause of action. A discriminatory effect would arise only when the system is put into operation and the employer 'applies' the system. Such application is not infirm under § 703(h) unless it is accompanied by a discriminatory purpose."); *Evans,* 431 U.S. at 560 (Section 703(h) "does not foreclose attacks on the current operation of seniority systems

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[27] "While these statements were made before § 703(h) was added to Title VII, they are authoritative indicators of that section's purpose" (*Teamsters,* 431 U.S. at 352). See *ibid.,* quoting 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey) (brackets in original) ("[T]he addition of § 703(h) 'merely clarifies [Title VII's] present intent and effect.' ").

which are subject to challenge as discriminatory."); *Franks,* 424 U.S. at 761 ("[T]he thrust of [Section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.").

C. Commencement of the Limitations Period Before the Challenged Seniority System Is Applied and Injures the Employee Would Frustrate Title VII's Purposes and Lead to Absurd Results.

AT&T and the court of appeals do not agree on the precise date on which Title VII's limitations period begins to run in a challenge to the application of an allegedly discriminatory seniority system, but they agree that it commences before the employee is concretely affected. As their own inability to agree on a particular date makes clear, however, the date the policy is applied in a manner that actually has a concrete adverse impact on a particular employee is the only sensible date on which to commence the limitations period, especially in light of the remedial purposes of Title VII.

1. First, as the court of appeals itself recognized (Pet. App. 8a), AT&T's view that all challenges to provisions of seniority systems must be brought within 300 days of their adoption would lead to nonsensical results. An individual injured by a seniority system adopted long before he became employed by the company would have no standing to complain until after his claim was time-barred. Thus, "[t]he principal focus of [Title VII]"—"the protection of the individual employee, rather than the protection of the minority group as a whole" (*Connecticut* v. *Teal,* 457 U.S. 440, 453-454 (1982))—would be defeated.

Of even broader concern, seniority systems, however discriminatory in purpose and in effect, would operate with impunity, immune from legal challenge under Title VII, just 300 days after being put into effect. Indeed, all seniority systems adopted prior to the enactment of Title VII would be immune from challenge. Absent compelling evidence to the contrary, and AT&T offers none, it cannot plausibly be supposed that Congress intended such a bizarre result, particularly in light of "the difficulty of fixing a[] [seniority system's] adoption date" (*American Tobacco Co* v. *Patterson,* 456 U.S. at 76 n.16). As this Court has observed, Title VII's "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes" (*Ricks,* 449 U.S. at 262 n.16).

2. The court of appeals' substitute proposal—under which the limitations period commences to run when the employee first becomes subject to the allegedly discriminatory seniority plan—is no more tenable. The court of appeals selected that compromise date in order to strike a balance "between eradicating existing discrimination and protecting the [seniority] rights of all employees" (Pet. App. 8a). As Judge Cudahy explained in his dissent to the majority opinion (*id.* at 10a), however, the court of appeals' ruling fails to serve either of those important interests. On the one hand, it undermines its own goal of preventing suits against seniority plans adopted long ago by permitting employees not covered at the time of a seniority system's enactment to challenge the plan when they first become subject to it. On the other hand, the court of appeals' approach suffers from the same flaw it found in AT&T's position. It requires employees to make irrevocable decisions whether to challenge an employment system at a time when "they ha[ve] not really been injured

and might never be injured" (*ibid.*). The employee therefore is faced with a Hobson's choice either to bring what may be an unnecessary and premature lawsuit against his employer, to the detriment of the employment relationship, or to forego any possibility of recovery in the event that the plan ever should operate to injure him.

3. There is also no merit to the court of appeals' contentions that a Title VII challenge to a facially neutral seniority system should be governed by different rules for the commencement of limitations periods than a challenge to an employer's action "pursuant to a seniority system that is facially discriminatory" (Pet. App. 9a). An act of intentional discrimination that is facially neutral is no less unlawful under Title VII. Section 703(h) requires only that those challenging seniority systems establish that, in addition to having a discriminatory effect, the seniority system was adopted, or is currently maintained, with an intention to discriminate. See *Teamsters*, 431 U.S. at 353, 356; *Swint*, 456 U.S. at 277. The critical issue in seniority cases is not whether the plan is *facially* neutral or discriminatory, but whether an intent to discriminate can be proven. Hence, when a seniority system not only has a discriminatory impact, but was "adopted because of its * * * discriminatory impact" (*Swint*, 456 U.S. at 277), the facial neutrality of the system is simply irrelevant. In this case, therefore, the employer's alleged discriminatory purpose in seeking to discourage women from becoming testers and to disadvantage women who currently are testers is equally repugnant to Title VII and injurious to employees, whether accomplished by a facially neutral or an overtly discriminatory seniority system.

Nor is the court of appeals' approach justified by the difficulties perceived by that court in ordering relief in

challenges brought long after a seniority system's adoption (Pet. App. 8a). As this Court explained in *Franks*, 424 U.S. at 779 n.41, district courts may use their equitable powers to limit the award of retroactive seniority to victims of discrimination where an award of full seniority would have an "unusual adverse impact." By analogy, district courts should be permitted to address other equitable concerns arising out of challenges to seniority systems, and thus be able to craft a case-specific remedy that properly balances the make-whole purposes of Title VII relief and the interests of innocent employees in particular cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JOINT

APPENDIX

(9)

Supreme Court, U.S.
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No. 87-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA A. LORANCE, *et al.*,
Petitioners,

v.

AT&T TECHNOLOGIES, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 26, 1988
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68 pp

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Notation as to the Printing in the Appendix to the Printing Petition for Certiorari of Opinions, Judgments and Orders

The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Report and Recommendation of the United States Magistrate, dated March 21, 1986 — 34a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, dated August 27, 1986 — 12a

Opinion of the United States Court of Appeals for the Seventh Circuit, dated August 19, 1987 — 3a

Order of the United States Court of Appeals for the Seventh Circuit, dated October 30, 1987 — 1a

Relevant Docket Entries from Courts Below

Lorance, et al. v. AT&T Technologies, et al., Civil Action No. 83 C 6602 (N.D. Ill.)

Sept. 26, 1983	Filed 9-20-83 Complaint and copy.
Nov. 21, 1983	Filed 11/18/83: Notice of filing; Defendant Western Electric Co's Inc.'s first request for produce.
Nov. 21, 1983	Filed 11/18/83: Notice of filing; ANSWER of defendant Western Electric Co., Inc.
Feb. 15, 1984	Filed 2/14/84 All Plaintiffs except (Georgia Gonzalez) Notice of Motion; Plaintiffs' Motion for leave to file first amended complaint; Plaintiff's FIRST AMENDED COMPLAINT.
Feb. 15, 1984	Enter Order dated 2/14/84: Status hearing held. Enter preliminary pretrial order (DRAFT) Plaintiff's motion to file first amended complaint is granted. Defendant to file answer to first amended complaint by March 14, 1984. Defendant's motion

	to exclude persons from the taking of depositions is resolved by agreement. Status hearing continued to June 21, 1984 at 9:00 a.m. Discovery cut-off date set for October 1, 1984. - NORDBERG, J.
Mar. 15, 1984	Filed 3/15/84 notice of filing; defendant AT&T Technologies, Inc's ANSWER to FIRST AMENDED COMPLAINT; Affirmative Defenses.
Mar. 27, 1984	Filed 3/26/84 Defendant Local 1942's notice of filing; Answer to first amended complaint
Mar. 30, 1984	Filed 3/29/84: Defendant's notice of filing and AT&T's motion for voluntary dismiss[al] of plaintiff Georgia Gonzales' complaint and joint motion for voluntary dismissal of plaintiff Georgia Gonzalez' complaint.
Apr. 3, 1984	Enter order dated 4/2/84: Defendant AT&T Technologies, Inc.'s motion for voluntary dismissal of plaintiff Georgia Gonzales' complaint is granted. Nordberg-J.

Jun. 22, 1984	Filed 6/21/84 Defendant AT&T Technologies, Inc.'s Motion for Summary Judgment.
Jun. 22, 1984	Enter order date 6/21/84: Status hearing held. The discovery cut off date of October 1, 1984 is hereby vacated. Defendant's oral motion for leave to file a motion for summary judgment is granted. Defendant AT&T is given to and including June 29, 1984 to file its memorandum in support. Defendant Union is given to and including July 13, 1984 to file its motion and memorandum in support. Plaintiffs' response to both motions is to be filed on or before July 27, 1984. Defendants' reply is due on or before August 10, 1984. The court will rule by mail. Status hearing is set for October 1, 1984 at 9:00 a.m. - NORDBERG, J.
July 2, 1984	Filed 6/29/84 Defendant's notice of filing; Memorandum in support of motion for summary judgment; Exhibit A&B.

Aug. 8, 1984	Filed 8/7/84 Plaintiff's Notice of Filing; Plaintiff's Memorandum in Opposition to Defendant AT&T Technologies, Inc.'s Motion for Summary Judgment; Exhibits A - C.
Sept. 17, 1984	Filed 9/11/84 Notice of filing; Defendant AT&T Technologies, Inc.'s reply memorandum in support of its motion for summary judgment.
Apr. 1, 1985	Enter order dated 3-26-85: The above-captioned cause is currently pending on my calendar. I recommend to the Executive Committee that this case be referred to a Magistrate of this Court. The reasons for my recommendation are: Perform review, conduct necessary evidentiary and other hearings on oral argument on dispositive pretrial matters, specifically: Report and recommendation on defendant's motion for summary judgment (Fully briefed). -Nordberg, J.- b. Enter order dated 3-28-85: It is hereby ordered that the above-captioned case be referred by lot to a Magistrate of this Court

	in accordance with the Rules. -Grady, ACJ- Notices mailed 4-1-85. CASE REFERRED TO MAGISTRATE GOTTSCHALL.
Aug. 27, 1985	Filed 8/23/85 defendant's Notice of Motion and Motion to Withdraw and Substitute Counsel.
Aug. 27, 1985	Enter order dated 8/23/85: Motion of defendant Local 1942 to withdraw Richard R. Solomon and Lloyd J. Tyler and substitute Joel A. D'Alba and Marvin Gittler as counsel on their behalf is granted subject to the right of plaintiff to object within 7 days. - Gottschall, M.
Jan. 30, 1986	Enter order dated 01/29/86: Parties are to prepare and submit joint written status reports. For further details see order on the reverse of the original minute order form. Attached Exhibit- LEINENWEBER-J.
Feb. 10, 1986	Filed 02/07/86; Joint Status Report.
Mar. 21, 1986	Minute order of 03/20/86: Enter Report and recommendation to the Honorable Harry D.

	Leinenweber. All matters relating to the referral of the above-entitled cause having been resolved, the cause is returned to the judge for further proceedings. For further detail, see order attached to the original minute order form. -- Rosemond, M.
Mar. 21, 1986	Enter order of 03/21/86: REPORT AND RECOMMENDATION
Mar. 31, 1986	Filed 03/28/86: NOTICE OF FILING OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION. (by plaintiffs).
Apr. 2, 1986	Notice of Motion; Motion.
May 2, 1986	Filed 05/01/86: Notice of Filing; Defendant AT&T Technologies, Inc.'s ANSWER to Plaintiffs' Objections to Magistrate's Report and Recommendation.
May 19, 1986	Filed 05/16/86: Notice of Filing; Plaintiffs' Reply Brief in Support of Plaintiffs' Objections to Magistrate's Report and Recommendation
Aug. 28, 1986	Minute order of 08/27/86: Defendants motion for summary judgment is granted. Enter

	memorandum opinion and order. (For further detail see order attached to the original minute order form.) Leineweber, J.
Aug. 27, 1986	Memorandum opinion and order.
Sept. 25, 1986	Filed 09/24/86: Plaintiffs' Notice of Appeal re: Order #63 and Memorandum Opinion & Order #64, dated 08/27/86. ($70.00 PAID)
Oct. 2, 1986	Filed 10/02/86: Defendant AT&T's Notice of Filing; Defendant's Request for Inclusion of Materials in the Record on Appeal.
Oct. 8, 1986	Filed 10/08/86: Defendant's (AT&T) Exhibits list.
Oct. 8, 1986	Filed 10/08/86: Deposition of Carol S.Bueschen (one volume).
Oct. 8, 1986	Filed 10/08/86: Exhibits to Deposition of Plaintiff Carol S. Bueschen (one volume).
Oct. 8, 1986	Deposition of Patricia Ann Lorance (one volume).
Oct. 8, 1986	Exhibits to Deposition of Plaintiff Patricia A.

	Lorance (one volume).
Oct. 8, 1986	Deposition of Janice Marie King (one volume).
Oct. 8, 1986	Exhibits to Deposition of Plaintiff Janice M. King (one volume).
Nov. 4, 1986	Certified and transferred 11/04/86 to the 7th Circuit Court of Appeals: The original record on appeal consisting of one volume of pleadings, together with six volumes of defendant AT&T's exhibits (Item #68A through #68C-1), filed under separate certificate for convenience sake.

Lorance, et al. v. AT&T Technologies, Inc., et al., No. 86-2584 (7th Cir.)

Aug. 19, 1987	Affirmed judgment of district court.
Oct. 30, 1987	Order denying petition for rehearing and suggestion for rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA A. LORANCE, JANICE M. KING and CAROL S. BUESCHEN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
-vs-	)	No. 83 C 6602 Judge Nordberg
AT&T TECHNOLOGIES, INC. and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

1. This action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to redress and enjoin unlawful discrimination against women employees by defendants AT&T Technologies, Inc. ("AT&T") and Local 1942, International Brotherhood of

Electrical Workers, AFL-CIO ("IBEW Local 1942"), at defendant AT&T's Montgomery Works.

JURISDICTION, VENUE AND PROCEDURAL REQUIREMENTS

2. Jurisdiction is conferred on this Court by 42 U.S.C. § 2000e-5(f), and 28 U.S.C. §§1343, 2201 and 2202.

3. The unlawful employment practices complained of herein have been and are being committed in the Northern District of Illinois.

4. Plaintiffs have complied fully with the procedural requirements of Title VII. Plaintiffs each filed timely charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") against defendants AT&T (then known as "Western Electric Co., Inc.") and IBEW Local 1942. On June 24, 1983, the EEOC issued to plaintiffs Notices of Right to

Sue defendant AT&T, and plaintiffs filed their initial complaint in this action within 90 days of receipt of those Notices. On December 21, 1983, the EEOC issued Notices of Right to Sue defendant IBEW Local 1942, and this First Amended Complaint, adding IBEW Local 1942 as a defendant, is being filed within 90 days of receipt of those Notices.

PARTIES

5. Plaintiff Patricia A. Lorance, Janice M. King and Carol S. Bueschen are female citizens of the United States and are residents of the Northern District of Illinois. All three plaintiffs are current employees of defendant AT&T at its Montgomery Works, and are members of defendant IBEW Local 1942.

6. Plaintiffs sue on behalf of themselves and on behalf of all women similarly situated, pursuant to Rules

23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class they represent includes all women at the Montgomery Works who have been, are being or will be adversely affected by defendants' ongoing unlawful an discriminatory manipulation of seniority rights of "testers". This class includes (a) women who are or were employed as testers, whose seniority rights have been impaired, (b) women who have earned seniority in lower-graded jobs who have been deprived of their right to carry their plant seniority into tester positions, and (c) women who have been or will be deterred from seeking promotion to tester positions, because of defendants' discriminatory manipulation of seniority rights.

(a) The class is so numerous that joinder is impracticable. Approximately 20-25 women employed as

testers have suffered impairment of their seniority rights, and over 1500 women employed in semi-skilled positions have been deprived of their right to promote into tester positions without loss of seniority.

(b) There are questions of law and fact common to the class. The primary factual and legal issues in this case will concern the circumstances and legality of defendants' change-over from plant seniority to "tester["] seniority, once women began to be promoted from semi-skilled positions to the traditionally-male tester positions.

(c) The claims of the named plaintiffs are typical of the class claims in that the plaintiffs have been injured by the same seniority manipulation that has injured the class as a whole.

(d) The named plaintiffs will

fairly and adequately protect the interests of the class. Their interests are in no way antagonistic to those of the class, and they have retained counsel experienced in class action employment discrimination litigation.

(e) The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole. Plaintiffs are requesting that defendants' unlawful manipulation of the seniority system be declared unlawful and enjoined. If this relief is granted it will benefit the entire class.

(f) Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class

action is superior to other available methods for the fair and efficient adjudication of the controversy. The principal evidence in this case will be directed at proving the discriminatory motivation and effect of defendants' manipulation of the seniority system. Purely individual questions will therefore be restricted to damage questions should liability be established. If no class action is certified it will lead to a multiplicity of lawsuits, causing an unnecessary burden on the courts.

7. Defendant AT&T Technologies, Inc. ("AT&T") is a corporation that employs more than 15 persons. Prior to January 1, 1984, defendant AT&T was known as Western Electric Co., Inc. Defendant AT&T is now and at all relevant times has been an employer within the meaning of Section 701(b) of Title VII, 42 U.S.C.

§2000e-(b). The discriminatory actions complained of herein took place at defendant AT&T's Montgomery Works, which is located within the Northern District of Illinois.

8. Defendant Local 1942, International Brotherhood of Electrical Workers, AFl-CIO ("IBEW Local 1942") is the union that represents, inter alia, hourly-rated non-supervisory production and maintenance employees at defendant AT&T's Montgomery Works. Defendant IBEW Local 1942 is now, and at all relevant times has been, a labor organization within the meaning of Section 701(d) of Title VII, 42 U.S.C. §2000e-(d).

FACTS

9. Defendant AT&T's Montgomery Works is a facility engaged in the manufacture of data sets, circuit packs, printed wiring boards and electronic

components. Employees at Montgomery Works fall into five cate[g]ories: (a) ungraded management personnel; (b) salaried personnel whose positions are graded, who are not represented by any union; (c) employees in a bargaining unit made up of salary-rated, graded personnel; (d) employees in the journeyman trades occupations; and (e) hourly-rated graded personnel. This lawsuit concerns persons classified as hourly-rated graded personnel.

10. The hourly-rated graded jobs are divided into job grades 32 through 39. Wage rates are based on job grades, with higher wage rates for higher-graded jobs.

11. Most of the hourly-rated graded jobs are semi-skilled positions, falling primarily into Job Grades 32 through 35. Within the higher grades are a group of jobs known as "tester" positions. Tester

positions range from Job Grade 35 through Job Grade 39.

12. The semi-skilled jobs in Grades 32 through 36 traditionally have been filled predominantly by women. Conversely, the tester jobs traditionally have been viewed as men's jobs and filled by men. The tester jobs were filled either by promoting from among the relatively few men in the lower-graded, non-tester jobs, or by hiring men off the street.

13. During the 1970's, a few women finally were promoted to tester positions. Upon information and belief, by the end of 1978, there were approximately 10-15 female testers, out of a group of approximately 200-250 testers. Then, in late 1978 or early 1979, a group of approximately 15 women were scheduled to take the examination that was then

required to become a tester.

14. In response to the increasing number of women who were becoming testers after years of working in lower-graded jobs, defendants conspired to change the seniority rules, in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs.

15. Upon information and belief, at least as far back as 1960, collective bargaining agreements between the defendants provided that promotions from one job grade to a higher job grade would be governed by plant seniority, among employees who have substantially the same qualifications. Similarly, displacements to a lower graded job, due to lack of work, were to be based on inverse plant seniority. This included promotions and downgradings of testers.

16. Under these seniority rules, the increasing entry of women into tester jobs in the late 1970's threatened the job security and job opportunities of male testers, since the new women testers generally had more years of plant seniority than many of the male testers.

17. In response to this perceived threat, defendants AT&T and IBEW Local 1942 conspired to change the seniority rules, so that "tester seniority", instead of plant seniority, would govern promotions and downgradings of any testers who (a) had less than five years of tester seniority, and (b) had not yet had time to complete a five-part training program that employees were to take after becoming testers.

18. The purpose and the effect of this manipulation of seniority rules has been to protect male testers from the

effects of the female testers" greater plant seniority, and to discourage women from entering the traditionally-male tester jobs.

19. This manipulation of seniority has injured the three named plaintiffs as follows:

(a) Plaintiff Patricia A. Lorance has been employed by defendant AT&T at its Montgomery Works since April 1970. She became a Grade 35 tester on October 30, 1978, and worked her way up to a Grade 38 tester on January 26, 1981. On November 15, 1982, Ms. Lorance was displaced due to a reduction in force, and was downgraded to a Grade 37 job, where she remained until November 1983 when she was promoted to a less-preferred Grade 38 job. Ms. Lorance would not have been downgraded if she had been allowed to exercise her plant seniority. Ms. Lorance

also may have been denied promotions to which she was entitled, as a result of defendants' manipulation of the seniority rules.

(b) Plaintiff Janice M. King has been employed by defendant AT&T at its Montgomery Works since May 1971. She became a Grade 35 tester on or about February 25, 1980, and subsequently advanced to a Grade 37 tester position. On August 23, 1982, Ms. King was downgraded to a Grade 36 tester, and has remained at that lower grade until the present time. Ms. King would not have been downgraded if she had been allowed to exercise her plant seniority. Ms. King also may have been denied promotions to which she was entitled, as a result of defendants' manipulation of the seniority rules.

(c) Plaintiff Carol S. Bueschen

has been employed by defendant AT&T at its Montgomery Works since February 1970. She became a Grade 35 tester on November 30, 1980. On November 15, 1982, Ms. Bueschen was downgraded completely out of the tester jobs, to a Grade 33 Utility Operator position. Ms. Bueschen remained in Grade 33 Utility Operator position. Ms. Bueschen remained in Grade 33 jobs until September 12, 1983, when she was upgraded to a Grade 36 tester position. On January 23, 1984, Ms. Bueschen was again downgraded out of the tester jobs, to a Grade 34 position. Ms. Bueschen would not have been downgrade don either occasion if she had been allowed to exercise her plant seniority. Ms. Bueschen also was denied a promotion to which she was entitled, as a result of defendants' manipulation of the seniority rules.

(d) Plaintiffs Lorance, King and Bueschen each filed union grievances over the downgradings, but IBEW Local 1942 failed to process these grievances in a timely manner. The second time Ms. Bueschen was downgraded, IBEW Local 1942 refused to process her grievance.

20. Other women testers also have been downgraded and/or denied promotions, as a result of defendants' use of "tester" seniority instead of plant seniority. Furthermore, all women who are employed in lower-graded, non-tester positions have lost their right to carry their plant seniority into tester positions. Some women in lower-graded, non-tester positions have been discouraged from seeking promotion to tester jobs, because of defendants' discriminatory manipulation of the seniority rules.

21. Plaintiffs Lorance, King and

Bueschen and the members of the class have no plain, adequate or complete remedy at law to redress the wrongs alleged herein,a nd this suit for permanent injunctive relief is the only means for securing adequate relief from defendants' discriminatory practices.

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Issue a declaratory judgment that defendants' manipulation of the seniority rules discriminates against women in violation of Title VII.

B. Grant a permanent injunction enjoining the defendants and their officers, agents, employees, successors, assigns and all persons in active concert with them from discriminating on the basis of sex, and in particular, requiring them to revert to the sue of plant seniority for purposes of promotion and down-grading

of testers.

C. Order defendants to engage in an affirmative action program to increase the number of women testers, in order to eradicate the effects of their discrimination.

D. Order defendants to make whole those women adversely affected by the unlawful employment practices described herein, including plaintiffs, by providing appropriate back pay, with interest, in an amount to be proved at trial, and other affirmative relief necessary to eradicate the effects of the unlawful employment practices.

E. Grant plaintiffs reasonable attorneys' fees and the costs of this action.

F. Grant such other and further relief as this court deems just.

Respectfully submitted,

/s/
Bridget Arimond
Attorney for the Plaintiffs

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170

[NOTE: The recopying of the complaint paragraphs in the Answer filed by Defendant AT & T Technologies, Inc. has been omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA A. LORANCE, JANICE M. KING and CAROL S. BUESCHEN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 83 C 6602
v.	)	Judge Nordberg
AT&T TECHNOLOGIES, INC., and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	
Defendants.	)	

DEFENDANT AT&T TECHNOLOGIES, INC.'S
ANSWER TO FIRST AMENDED COMPLAINT

Defendant, AT&T TECHNOLOGIES, INC., by its attorneys, hereby answers Plaintiffs' first amended complaint as follows:

FIRST DEFENSE

1. Defendant admits that plaintiffs purport to this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., but defendant denies that it has violated said statute.

2. Defendant denies the allegations of paragraph 2 of the first amended complaint.

3. Defendant denies the allegations of paragraph 3 of the first amended complaint.

4. Defendant denies the allegations of paragraph 4 of the first amended complaint insofar as they pertain to defendant, except that defendant admits that each of the plaintiffs filed charges with the Equal Employment Opportunity Commission and, that the Commission investigated those charges and found no reasonable cause to believe that the

allegations in those charges were true. Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 insofar as they pertain to other parties to this action, and defendant therefore denies them.

5. Defendant admits the allegations contained in paragraph 5 of the first amended complaint.

6. Defendant denies the allegations contained in paragraph 6 of the first amended complaint, and further avers that this lawsuit may not properly proceed as a class action.

7. Defendant denies it has taken or participated in any discriminatory actions, but otherwise admits the allegations contained in paragraph 7 of the first amended complaint.

8. Defendant admits the allegations

contained in paragraph 8 of the first amended complaint.

9. Defendant admits the allegations contained in paragraph 9 of the first amended complaint.

10. Defendant admits the allegations contained in paragraph 10 of the first amended complaint.

11. Defendant denies that employees holding graded jobs in Job Grades 32 through 35 are described by it as "semi-skilled" employees but admits the remaining allegations contained in paragraph 11 of the first amended complaint.

12. Defendant denies the allegations contained in paragraph 12 of the first amended complaint.

13. Defendant denies the allegations contained in paragraph 13 of the first amended complaint.

14. Defendant denies the allegations contained in paragraph 14 of the first amended complaint.

15. Defendant generally admits the allegations contained in paragraph 15 of the first amended complaint but denies that the only considerations for promotion and/or displacement are those set forth in paragraph 15.

16. Defendant denies the allegations contained in paragraph 16 of the first amended complaint.

17. Defendant denies the allegations contained in paragraph 17 of the first amended complaint.

18. Defendant denies the allegations contained in paragraph 18 of the first amended complaint.

19. Defendant denies the allegations contained in paragraph 19 of the first amended complaint.

20. Defendant denies the allegations contained in paragraph 20 of the first amended complaint.

21. Defendant denies the allegations contained in paragraph 21 of the first amended complaint.

SECOND DEFENSE

The first amended complaint fails to state a claim against defendant upon which relief can be granted.

THIRD DEFENSE

Insofar as plaintiffs seek in this action to recover relief under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., for alleged incidents of discrimination occurring prior to 180 days before the filing of the charges of discrimination upon which this action is based, or for alleged incidents of discrimination which were not raised in such charges, such relief is barred by the

provisions of Section 706(e), 42 U.S.C. § 2000e-5(e), of the Act.

FOURTH DEFENSE

This action is barred by the doctrine of laches.

FIFTH DEFENSE

Irrespective of the other deficiencies in plaintiffs' first amended complaint, defendant is not liable to plaintiffs because its actions were all taken pursuant to a bona fide seniority or merit system within the meaning of Section 703(h), 42 U.S.C. § 2000e-2(h).

WHEREFORE, defendant, AT&T Technologies, Inc. prays that the relief prayed for in the first amended complaint be denied, judgment be entered in favor of defendant and against plaintiffs, and

defendant be awarded its costs, including reasonable attorneys' fees.

Respectfully submitted,

Gerald D. Skoning
Charles C. Jackson
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

By /s/ Charles C. Jackson
One of the Attorneys
for Defendant
AT&T TECHNOLOGIES, INC.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Dated: March 14, 1984

[NOTE: The recopying of the complaint paragraphs in the Answer filed by Defendant Local 1942 International Brotherhood of Electrical Workers AFL-CIO has been omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA A. LORANCE, JANICE M. KING and CAROL S. BUESCHEN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 83 C 6602
vs.	)	Judge Nordberg
AT&T TECHNOLOGIES, INC., and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	)	
Defendants.	)	

DEFENDANT LOCAL 1942 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO ANSWER TO FIRST AMENDED COMPLAINT

Defendant, Local 1942, International Brotherhood of Electrical Workers, AFL-

CIO, by its attorneys, hereby answers Plaintiffs' first amended complaint as follows:

1. Defendant admits that plaintiffs purport to this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., but defendant denies that it has violated said statute.

2. Defendant denies the allegations of paragraph 2 of the first amended complaint.

3. Defendant denies the allegations of paragraph 3 of the first amended complaint.

4. Defendant denies the allegations of paragraph 4 of the first amended complaint insofar as they pertain to defendant, except that defendant admits that each of the plaintiffs filed charges with the Equal Employment Opportunity Commission and, that the Commission

investigated those charges and found no reasonable cause to believe that the allegations in those charges were true. Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 insofar as they pertain to other parties to this action, and defendant therefore denies them.

5. Defendant admits the allegations contained in paragraph 5 of the first amended complaint.

6. Defendant denies the allegations contained in paragraph 6 of the first amended complaint, and further avers that this lawsuit may not properly proceed as a class action.

7. Defendant denies it has taken or participated in any discriminatory actions, but otherwise admits the allegations contained in paragraph 7 of

the first amended complaint.

8. Defendant denies it has taken or participated in any discriminatory actions, but otherwise admits the allegations contained in Paragraph 8 of the first amended complaint.

9. Defendant admits the allegations contained in Paragraph 9 of the first amended complaint.

10. Defendant admits the allegations contained in paragraph 10 of the first amended complaint.

11. Defendant denies that employees holding graded jobs in Job Grades 32 through 35 are described by it as "semi-skilled" employees but admits the remaining allegations contained in paragraph 11 of the first amended complaint.

12. Defendant denies the allegations contained in paragraph 12 of the first

amended complaint.

13. Defendant denies the allegations contained in paragraph 13 of the first amended complaint.

14. Defendant denies the allegations contained in paragraph 14 of the first amended complaint.

15. Defendant generally admits the allegations contained in paragraph 15 of the first amended complaint but denies that the only considerations for promotion and/or displacement are those set forth in paragraph 15.

16. Defendant denies the allegations contained in paragraph 16 of the first amended complaint.

17. Defendant denies the allegations contained in paragraph 17 of the first amended complaint.

18. Defendant denies the allegations contained in paragraph 18 of the first

amended complaint.

19. Defendant admits that the named plaintiffs were downgraded but denies the remaining allegations of paragraph 19 of the first amended complaint and further avers that it grieved actions which were not in compliance with the collective bargaining agreements between the defendants.

20. Defendant denies the allegations contained in paragraph 20 of the first amended complaint.

21. Defendant denies the allegations contained in paragraph 21 of the first amended complaint.

SECOND DEFENSE

The first amended complaint fails to state a claim against defendant upon which relief can be granted.

THIRD DEFENSE

Insofar as plaintiffs seek in this

action to recover relief under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., for alleged incidents of discrimination occurring prior to 180 days before the filing of the charges of discrimination upon which this action is based, or for alleged incidents of discrimination which were not raised in such charges, such relief is barred by the provisions of Section 706(e), 42 U.S.C. § 2000e-5(e), of the Act.

FOURTH DEFENSE

This action is barred by the doctrine of laches.

FIFTH DEFENSE

Irrespective of the other deficiencies in plaintiffs' first amended complaint, defendant is not liable to plaintiffs because its actions were all taken pursuant to a bona fide seniority or merit system within the meaning of Section

703(h), 42 U.S.C. § 2000e-2(h).

WHEREFORE, defendant, Local 1942, International Brotherhood of Electrical Workers, AFL-CIO, prays that the relief prayed for in the first amended complaint be denied, judgment be entered in favor of defendant and against plaintiffs, and defendant be awarded its costs, including reasonable attorneys' fees.

Respectfully submitted,

Richard R. Solomon
Lloyd J. Tyler
105 E. Galena
P.O. Box 1425
Aurora, Illinois 60507
(312) 897-0559

By_____

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Lloyd J. Tyler
Tyler, Solomon &
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(312) 897-0559

EXHIBIT LORANCE DEP. #3

NEWS & VIEWS OF LOCAL 1942
International Brotherhood
of Electrical Workers

International Brotherhood of Electrical Workers, Local 1942/Montgomery, Illinois/
Friday, May 25, 1979

TO CLARIFY ANY QUESTION PERTAINING TO COMPANY POLICIES ON TESTING CONCEPTS HERE ARE THE GENERAL GUIDELINES. IF THERE ARE ANY QUESTIONS PLEASE CONTACT JIM CAPPLEMAN.

GENERAL GUIDELINES

THE FIVE YEAR TESTER TRAINING PROGRAM STARTS WHEN EMPLOYEE BECOMES A 35 grade tester.

CURRENT 35 GRADES WHO MEET THE TIME REQUIREMENT FOR 36 GRADE WILL BE PROMOTED.

ALL TESTER TRAINEES WILL BE PROMOTED TO 36 GRAD[E] UPON THE COMPLETION OF TWO YEARS PERFORMANCE AT THE 35 GRADE LEVEL.

ALL MOVEMENT (EXCEPT LAYOFF) WITHIN THE FIVE YEAR TESTER TRAINING PROGRAM WILL BE BASED ON THE DATE OF ENTRY INTO THE PROGRAM.

Ex. Lorance Dep. #3

FOR MOVEMENT OF PERSON[N]EL PURPOSES, THE SENIORITY OF ALL CURRENT 35 AND 36 GRADE TESTERS WILL BE THEIR DATE OF ENTRY INTO THE TESTING UNIVERSE.

IF NECESSARY TO PROMOTE TO 36 PRIOR TO ANY CANDIDATES FULFILLING TIME REQUIREMENT, CANDIDATE CLOSEST TO MEETING TIME REQUIREMENT WILL BE PROMOTED.

"QUALIFICATIONS" AS REQUIRED IN ARTICLE 25 FOR MOVEMENT TO ALL 37 GRADE VACANCIES SHALL BE INTERPRETED AS THE SUCCESSFUL COMPLETION OF THE TRAINING PROGRAM.

TRAINING PROGRAM MODULE

I. BASIC ELECTRONICS & ACTIVE DEVICES (32HRS)
II. LINEAR INTEGRATED CIRCUITS/OP AMPS (32HRS.)
III. DIGITAL DEVICES & MICROCOMPUTERS (60HRS.)
IV. BASIC PROGRAMMING (32HRS.)
V. DATA COMMUNICATIONS (40HRS.)

ONCE 36 GRAD[E] HAS BEEN ATTAINED, ALL MOVEMENT OUT OF THE TESTING UNIVERSE SHALL BE FROM 36 GRADE.

WITHIN FIVE YEARS OF ENTRY INTO THE TESTING UNIVERSE, ALL TRAINEES WILL BE AFFORDED THE OPPORTUNITY TO ATTEND THE TRAINING PROGRAM IN ORDER TO QUALIFY FOR 37 GRADE.

THE INTENT IS TO SEND THE SENIOR TRAINEES (TIME IN TESTER UNIVERSE) TO THE TRAINING PROGRAM.

THE TRAINING MODULES MUST BE SUCCESSFULLY COMPLETED IN NUMERICAL ORDER (i.e. I-BASIC ELECTRONICS & ACTIVE DEVICES MUST BE SUCCESSFULLY COMPLETED PRIOR TO BEING ELIGIBLE TO TAKE II-LINEAR INTEGRATED CIRCUITS/OP AMPS).

EMPLOYEES FAILING A MODULE WILL BE GIVEN A SECOND OPPORTUNITY AT THE NEXT TIME MODULE IS OFFERED.

IT IS THE COMPANY'S INTENTION THAT ALL REASONABLE EFFORT WILL BE MADE TOWARD ASSISTING ALL CANDIDATES TO SUCCESSFUL PROGRAM COMPLETION.

IF THERE IS SUFFICIENT DEMAND FROM CURRENT EMPLOYEES WHO ARE TRAINING TO BE TESTERS, THE COMPANY WILL ESTABLISH AN "OPEN-LABORATORY" PROGRAM.

1. THE BASIC PREMISE OF THIS PROGRAM WILL BE TO PROVIDE "HANDS-ON" EXPERIENCE FOR PROSPECTIVE TESTERS.

2. THIS PROGRAM WILL BE AVAILABLE STRICTLY ON AN OUT-OF-HOURS BASIS.

3. THE ADMINISTRATION OF THIS PROGRAM, INCLUDING DURATION AND REQUIREMENTS FOR PARTICIPATION, SHALL BE DETERMINED SOLELY BY THE COMPANY.

4. PARTICIPATION IN THE "OPEN LABORATORY" WILL NOT BE

RECOGNIZED AS EXPERIENCE FOR PRE-EXAM SCREENING.

ADDITIONAL PROPOSALS PER AGREEMENT WITH MR. ED MCGOVERN (BARGAINING AGENT)

1. EMPLOYEES THAT HAVE HELD 37 GRADE OR ABOVE IN TESTING UNIVERSE WILL NOT BE REQUIRED TO TAKE TRAINING PROGRAM MODULE.

2. 37 GRADE AND ABOVE TESTERS WILL BE ALLOWED ON A VOLUNTARY BASIS TO ATTEND TRAINING PROGRAM MODULES BASED ON AVAILABLE SPACE FOR THAT MODULE.

Section 4 above, has been changed to read as follows:

3. THE "HANDS-ON EXPERIENCE WILL COUNT FOR 3HRS. TOWARD 18 SEMESTER HOURS COLLEGE CREDIT IN ELECTRONICS FOR PRE-EXAMINATION SCREENING.

MOVEMENT OF PERSON[N]EL COMMITTEE

4. THE UNION IS MEETING REGULARLY WITH THE COMPANY IN REGARDS TO JOB GRADES AND MOVEMENT OF PERSON[N]EL TO TRY AND ESTABLISH A PROCEDURE FOR ALL EMPLOYEES INCLUDING CLERICAL TO MOVE THROUGH THE GRADES. WE HOPE TO HAVE THIS ACCOMPLISHED BY THE END OF THE YEAR.

SZABO FOODS NEGOTIATIONS

THIS IS TO INFORM THE MEMBERSHIP THAT THE CAFETERIA EMPLOYEES CONTRACT EXPIRES JUNE 1, 1979.

THROUGH COLLECTIVE NEGOTIATIONS WITH SZABO FOODS AN OFFER WAS MADE AND VOTED ON MAY 12, 1979 AT THE UNION HEADQUARTERS. THE EMPLOYEES BY A MANDATE VOTE REJECTED THIS OFFER. WITH THE ASSISTANCE OF INTERNATIONAL REPRESENTATIVE MR. PAT CURLEY ON MAY 22, 1979, WE WERE ABLE TO ESTABLISH A DAY TO DAY NEGOTIATIONS. WE HAVE AGREED AND HOPE TO HAVE A PACKAGE BY JUNE 14, 1979. SHOULD WE NOT HAVE A PACKAGE AT THAT TIME, THE MEMBERSHIP WILL BE NOTIFIED AND GIVEN INSTRUCTIONS.

/s/ James Cappleman

EXHIBIT LORANCE DEP. #21

Agreement made this 23rd day of July 1979 by and between the WESTERN ELECTRIC COMPANY, INCORPORATED, Montgomery Works, hereinafter called the "Company" and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Local 1942 hereinafter called the "Union."

WHEREAS, the Company and the Union, through their respective representatives have entered into discussion of a Five-Year Tester Training Program, hereinafter referred to as the Program, and,

WHEREAS, the Company and the Union, have opened the General Agreement dated August 13, 1977, solely for the purpose of negotiating certain changes in said General Agreement as it relates to the Program and,

WHEREAS, the parties have reached agreement on such matters and desire to express such agreement in writing;

NOW THEREFORE, in consideration of the premises, and the mutual agreements herein contained, the parties agree with each other as follows with respect to the employees of the Company recognized as being represented by the Union:

A. Definition of Terms

(1) TERM OF EMPLOYMENT of employees in the Program, for movement of personnel purposes, except layoff, shall be defined as the date of entry into the tester universe; shall include service in the universe prior to the effective date of this Agreement and such TERM OF EMPLOYMENT shall be adjusted thereafter, if appropriate, in accordance with BENEFIT PLAN instructions.

(2) TERM OF EMPLOYMENT of employees in the Program for layoff and all other purposes shall be as computed under the BENEFIT PLAN.

(3) Qualifications as applied to upgrade to a 36 grade tester level shall be the completion of two (2) years experience as a 35 grade tester and as applied to upgrade to the 37 grade tester level shall be the successful completion of the Program.

B. After an employee completes five (5) years service in the tester universe, his/her TERM OF EMPLOYMENT for all purposes shall be as computed under the BENEFIT PLAN.

C. The Program begins when an employee attains the 35 grade tester level, which will be upon the successful completion of an examination designated by the Company.

D. On the effective date of this Agreement, a 35 grade tester who has two (2) or more years experience as a 35 grade tester will be upgraded to a 36 grade tester.

E. A 35 grade tester, upon completion of two (2) years experience as a 35 grade tester shall be upgraded to 36 grade tester.

F. If the Company determines that it is necessary to upgrade a 35 grade tester to a 36 grade tester prior to the candidate completing the two (2)years experience requirement at the 35 grade level, the candidate who is the closest to completing the two (2) year requirement shall be upgraded.

G. If a 36 grade tester is moved out of the tester universe for any reason, and said employee is later returned to the tester universe, the employee shall return at a 36 grade tester level.

H. Within five (5) years of entry into the testing universe, all 36 grade testers will be offered, in order of tester universe TERM OF EMPLOYMENT, an opportunity to attend and successfully complete the training program modules in numerical order.

I. (1) An employee will not be bypassed for upgrading to a 37 grade tester level if, due to the needs of the business, the employee was not given the opportunity to attend a training module as scheduled.

(2) An employee upgraded to the 37 grade tester level under the circumstances noted in I (1) will continue at this level contingent on the employee successfully completing the module as scheduled.

J. An employee not successfully completing a module will be given another opportunity and if the module is not successfully completed a second time, the Company will decide on an individual basis if it will be offered again.

K. The Company agrees to make a reasonable effort to provide training modules on all shifts, contingent on class size, and to assist all candidates to successfully complete the Program.

L. The Company agrees to make a reasonable effort to provide the training modules to all 37 grade testers and above depending on the availability of training class openings.

M. The Company agrees to establish an "open laboratory" program for all employees training to become testers if it determines there is sufficient demand. This program will provide for:

(1) "Hands on" experience on an out-of-hours basis.

(2) Employees who successfully complete this program will be credited with the

equivalent of three (3) hours college credit toward the pre-examination requirement.

N. The Company agrees to continue to provide counseling to employees training to become testers.

The Company agrees to meet with the Union periodically to review the Program, and the Company will solely determine if any revisions to the Program will be implemented.

The administration of the Program, including its duration and requirements for participation, shall be determined solely by the Company.

This agreement shall become effective at 12:01 a.m. on August 1, 1979, but only if ratified by the Union membership and approved by the International Office and the Company so notified on or before August 6, 1979.

Except as modified herein, all terms and conditions of the General Agreement dated August 13, 1977, shall continue in full

force and effect in accordance with its terms.

For the Union

/s/ James Cappleman
President, Local 1942
Date 7/23/79

For the Company

/s/ J. E. McGovern
Bargaining Agent
Date 7/23/79

Ratified by Union Membership

/s/ James Cappleman
President, Local 1942
Date 6/28/79

Approved by International Office IBEW

_____
President
Date_____

Ex. Lorance Dep. #21

EXHIBIT BUESCHEN DEP. #15

Training School

SECTION I - MODULE CURRICULUM

Module No. I - Advanced Electronics- 21 Hours (2 weeks & 1 day)

A study of component identification, the use of test instrumentation, troubleshooting techniques and repair specifications.

Module No. II - Linear Integrated Circuits - 36 Hours (3 weeks & 2 days)

A study of operational amplifier applications, timers and troubleshooting techniques.

Module No. III - Digital Devices & Microcomputers - 60 Hours (5 weeks & 2 days)

A study of basic and advanced digital logic elements, microcomputer peripherals, machine language programming, microcomputer systems and troubleshooting techniques.

Module No. IV - Basic Programming - 40 Hours (4 weeks)

A study of high level language programming, computerized testing

Ex. Bueschen Dep. #15

techniques and program interpretation.

Module V – Data Communications – 24 Hours (2 weeks)

A study of the telephone system, E.I.A. standards, protocols, data communications networks, modulation techniques and functional descriptions of modems.

Note: The training modules must be successfully completed in numerical order.

SECTION II - MODULE AVAILABILITY AND PARTICIPATION

Availability

There must be a minimum of ten (10) employees available to attend a module, and there will be a maximum of fifteen (15) employees attending a module. If there are less than ten (10) employees available to attend a module, the class will be cancelled.

Participation

An opportunity to attend the Tester Training Program modules shall be offered in the following order:

1. Conditionally upgraded employees shall be selected in order of successfully lower grade levels by seniority.

2. 36 grade employees, by seniority.

3. 35 grade employees, by seniority.

4. The Training organization, depending on the availability of the classroom will then offer the Tester Training Program modules to non-conditional 39, 38 and 37 grade Testers and qualified QA and QT employees who have submitted "Voluntary Employee Request to Attend Module(s) of Tester Training Program", from MG-16.500-A.

SECTION III - SCHEDULING OF MODULES

Tester module classes will be scheduled by the Training School and Placement.

Prior to a module starting, Placement will send the department chiefs involved a listing of employees by grade and seniority that are required to take the module. The department chiefs should have their section chiefs talk to the employees selected to attend that are on the shift the module is scheduled for an inquire if they can attend the module, if they are selected to go.

The section chief is to write on the listing, next to the employee's name, if they can attend the module or

not. If the employee cannot attend the module, the supervisor must write the reason for non-attendance, such as departmental hold, employee refused or employee is already scheduled for vacation.

This listing is to be returned to Placement by the date requested. From this listing, Placement will send a memo to the department chiefs and training instructor involved, designating the employees who are to attend the module. If more than the required amount of Testers are available for the module, then one or two alternates will be included on the memo for backup purposes.

When the supervisors receive this memo, they are to inform the employees attending the class of the attendance policy outlined in Section IV.

SECTION IV - ATTENDANCE

Supervisor's Responsibility

As soon as practicable prior to a module starting, the supervisor is to inform their employee(s) of the following:

1. That the student is schedule to attend the module.

2. If the first class is missed, the student will be dropped from

the module with possible penalties. (See Section v)

3. Students will be dropped with possible penalties if two (2) consecutive classes are missed; and in no case will an employee be allowed to miss a total of more than two classes.

4. An employee is to inform his/her supervisor if a class will be missed.

Note: The supervisor must then inform the Training School why the employee will miss the class.

5. If any class, other than the first, is missed, it is the student's responsibility to arrange a make-up class with the instructor.

Note: The training instructor is to review Steps 3 and 5 with the employees.

SECTION V - FAILURE OF A MODULE

DEFINITIONS

Considered as Failing

An employee will be considered as failing a module if one of the following conditions apply to him/her:

1. If a 35, 36 or conditionally upgraded Tester refuses to attend a module.

2. If an employee is attending a module and is dropped by the Training School due to an employee taking a Personal Absence, PI, EWD, EPR or vacation day. (Refer to ATTENDANCE - SECTION IV, No. 2 and No. 5)

Failed

If the employee finishes the module and does not pass.

Note: If an employee is dropped from the Training School because of a sickness absence, disability or death in the immediate family, the employee will not be considered as failed. Other types of absences not covered here shall be referred to Labor Relations for disposition.

FIRST FAILURE

If a Tester fails or is considered as failing a module the first time, the immediate supervisor must formally interview and review the following points with his/her employee:

1. The employee will be offered a second opportunity to pass the module that was failed.

2. The employee will be rescheduled for the next module with an opening available on his/her shift.

3. The employee must be informed that should he/she fail or be considered as failing the same module for the second time, the following would occur:

   a) Should the employee be a conditionally upgraded Tester he/she will be downgraded to a 36 grade Tester.

   b) The employee will not be considered for a conditional upgrade or a module for a one (1) year period.

   c) The employee must take and pass outside course(s) suggested by the Training School in order to continue with the Program after the one (1) year waiting period.

Note: The original write up of the interview must be sent the Placement organization.

SECOND FAILURE

If a Tester fails or is considered as failing the same module for the second time, the supervisor will again formally interview the employee informing him/her of the conditions outlined below:

1. The conditionally upgraded Tester will be downgraded to a 36 grade Tester.

2. The employee will be ineligible for a conditional upgrade for a one (1) year period.

3. The employee will be ineligible to attend a module for a one (1) year period.

4. The employee will be informed by the Training School during an appointment arranged by his/her supervisor as to what outside courses will be suggested.

Note: The immediate supervisor must be present at this meeting and form MG-12-102-Y "Failed a Module for the Second Time" must be completed. The original form that the employee signs must be sent to the Placement organization.

5. At the end of a one (1) year period, if the employee took the

suggested course(s) and successfully passed, he/she may be eligible to attend the module failed and to bid on a conditional upgrade. The decision to offer a third opportunity to attend a module is reserved by the Company.

Note: Step 1 applies strictly to a conditionally upgraded Tester, whereas Steps 2 through 5 apply to all Testers.

SECTION VI - DISTRIBUTION OF GRADES

The following personnel will receive a copy of the list of those who passed, failed, dropped or who were considered as failing from the Training School:

Student's department chief
Personnel organization
Placement organization

PETITIONER'S

BRIEF

No. 87-1428 (6)

Supreme Court, U.S.
FILED
DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA A. LORANCE, JANICE M. KING, and CAROL S. BUESCHEN,

Petitioners,

v.

AT&T TECHNOLOGIES, INC., and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

79pp

QUESTION PRESENTED

Are administrative charges filed by female workers under Title VII of the Civil Rights Act of 1964 timely when filed within 300 days of their demotion to lower-paying jobs caused by the operation of a discriminatory seniority system that was designed to advantage male workers over female workers?

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No. 87-1428

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PATRICIA A. LORANCE, JANICE M. KING, and CAROL S. BUESCHEN,

Petitioners,

v.

AT&T TECHNOLOGIES, INC., and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 827 F.2d 163 and is set out in the Appendix to the Petition for Writ

of Certiorari (Pet. App.) at pages 3a-11a. The order denying rehearing, which is not reported, is set out at Pet. App. 1a-2a. The district court's memorandum opinion is unreported and is set out at Pet. App. 12a-33a. The Report and Recommendation of the United States Magistrate is unreported and is set out at Pet. App. 34a-50a.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1987. The court of appeals entered an order denying a timely petition for rehearing and suggestion for rehearing en banc on October 30, 1987. On January 19, 1988, Justice John Paul Stevens signed an Order extending the time for filing the petition for a writ of certiorari until February 27, 1988. The Petition for a Writ of Certiorari was filed on February 26, 1988, and was granted on October 11, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2, provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire ... or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin....
>
> (c) It shall be an unlawful employment practice for a labor organization-

> (2) to limit, segregate, or classify its membership ... in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee ... because of such individual's race, color, religion, sex or national origin....
>
> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....

Section 706(e) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred..., except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted

> proceedings with a State or local agency ..., such charge shall be filed ... within three hundred days after the alleged unlawful employment practice occurred....

STATEMENT OF THE CASE

Plaintiffs Lorance, King and Bueschen brought this Title VII action claiming that defendants AT&T Technologies, Inc. (AT&T or Company) and Local 1942, International Brotherhood of Electrical Workers, AFL-CIO (Local 1942 or Union) discriminated against them on the basis of their gender when the plaintiffs were demoted by the operation of an unlawful seniority system discriminatorily designed to limit the job rights of female workers who had recently promoted into traditionally male jobs. The lower courts failed to decide these claims because the courts determined that the plaintiffs did not file timely charges with the Equal Employment Opportunity Commission since

the charges were not filed within 300 days from the date that the plaintiffs became subject to the illegal seniority system. The plaintiffs argue that female workers may file timely Title VII charges within 300 days from the date that the discriminatorily designed seniority system was operated to demote them to lower-paying jobs while male workers with less seniority in the plant were retained in higher-paying jobs.

* * * * *

1. Plaintiffs Patricia Lorance, Janice King and Carol Bueschen have been employed for many years in hourly wage positions in the Montgomery Works facility of AT&T in Aurora, Illinois. Lorance and Bueschen have worked as hourly employees since 1970 and King since 1971. Pet. App. 4a. Lorance, King and Bueschen are members of Local 1942. Ibid.

The hourly paid jobs in the Montgomery Works are divided into job grades 32 through 39.[1] The higher the job grade, the greater the wage rate paid to workers in the job. Joint App. 18, 32. Among the highest-paying hourly jobs is a category of jobs collectively referred to as the "tester universe." Pet. App. 4a.

Most of the hourly wage jobs in the Montgomery Works are in the lower-paying job grades and have been traditionally occupied by women. Pet. App. 15a. But the higher-paying tester positions have been traditionally viewed as men's jobs. These tester jobs have

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[1] There are four other types of jobs in the Montgomery Works: (a) ungraded management personnel; (b) salaried personnel whose positions are graded; (c) salaried personnel who are represented by a union; (d) employees in the journeyman trades occupations. This lawsuit does not concern employees in these positions or the selection procedures for these positions. Joint App. 18, 32.

been filled either by promoting the relatively few men in the lower-graded jobs or by hiring men directly into the tester jobs. Ibid.

"Although [the tester] positions traditionally had been filled by men, by 1978 an increasing number of women had used their plant-wide seniority to obtain jobs as testers." Pet. App. 4a. Until 1979 the standard of plant seniority governed job promotions and job reductions-in-force within the job-graded hourly positions. Given relatively equal qualifications the employee who had been employed for the longest period within Montgomery Works would be the first promoted and the last demoted.[2]

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[2] At least since 1960 collective bargaining agreements between the Company and Union provided that promotions and demotions within the graded hourly position would be governed by plant seniority. Joint App. 20, 33, 41.

In late 1978 or early 1979 the Union initiated discussions with AT&T to change the seniority system, which up to that time would have permitted female workers to use their plant seniority to promote from one job to another within the "tester universe" and to remain in tester jobs if there were a reduction-in-force. The Union and the Company developed a proposal, known as the "tester concept." The proposal provided that after a worker became a tester, job promotions and demotions were to be based upon the length of time that the worker had been a tester ("tester seniority"), rather than on the length of time a worker had been employed at Montgomery Works. Pet. App. 4a.

The proposed "tester concept" was "heatedly debated in several union

meetings"[3] but "was passed on June 28, 1979 by a hand vote of 90 to 60, reflecting the approximate proportions of men and women in attendance." Pet. App. 16a-17a; Pet. App. 5a.[4] On July 23, 1979, the Union and Company signed an agreement adopting the tester concept, Pet. App. 5a, Joint App. 50-56, which was incorporated into the master contract between AT&T and Local 1942 in August, 1980. Pet. App. 17a.

The tester concept provision

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[3] For example, Ms. Lorance testified that at a union meeting "it was mentioned that women were coming in with seniority and passing the men up and they were tired of it." Dep. of Lorance, March 19, 1984, at 103.

[4] The court of appeals decision erroneously stated the date of the meeting as June 28, 1978, Pet. App. 5a, but the correct date is June 28, 1979, as set forth in the district court opinion. Pet. App. 16a; see, Joint App. 56.

established a dual seniority system[5] whereby job promotion and demotion within the tester universe was governed by a worker's initial date of assignment to a job in the tester universe, while the worker's initial date of hire into Montgomery Works governed all other matters. Pet. App. 16a. However, the forfeiture of plant seniority for job promotions or demotions within the tester

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[5] The pertinent sections of the agreement are as follows: "(1) TERM OF EMPLOYMENT of employees in the program, for movement of personnel purposes, except layoff, shall be defined as the date of entry into the tester universe; shall include service in the universe prior to the effective date of this Agreement.... (2) TERM OF EMPLOYMENT of employees in the program for layoff and all other purposes shall be as computed under the BENEFIT PLAN." Joint App. 51.

Under the benefit plan the term of employment is computed on the basis of length of service in the facility.

universe was limited to five years.[6]

At the time the Company and Union signed the tester concept agreement, petitioner Lorance was a tester. In February 1980 petitioner King, and in November 1980 petitioner Bueschen, were promoted to tester positions. Pet. App. 5a. In summer 1982 the petitioners were demoted for the first time pursuant to the dual seniority system. Since the petitioners had not worked as testers for five or more years they were demoted during a reduction in force on the basis of their "tester seniority" rather than

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[6] The pertinent section of the agreement provides that

> "[a]fter an employee completes five (5) years service in the tester universe, his/her TERM OF EMPLOYMENT for all purposes shall be as computed under the BENEFIT PLAN." Joint App. 52.

their "plant seniority." Lorance and King were demoted to lower-paying tester positions and Bueschen was demoted to a non-tester position. Ibid.

The petitioners and other female workers were demoted to lower paying jobs even though male workers with less plant seniority were retained in the higher paying positions. If the traditional plant seniority system had applied, petitioners Lorance, King and Bueschen would not have been demoted. Pet. App. 5a.

2. Within 300 days of their job demotions,[7] Lorance, Bueschen and King filed charges with the Equal Employment

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[7] Petitioner King was downgraded on August 23, 1982, petitioner Lorance on November 15, 1982, and petitioner Bueschen on November 15, 1982, and January 23, 1984. Pet. App. 17a. Lorance and Bueschen filed their EEOC charges on April 13, and King filed her charge on April 21, 1983. Pet. App. 5a.

Opportunity Commission claiming that they were demoted because of their gender in violation of Title VII of the Civil Rights Act of 1964.

3. As required by Title VII,[8] on September 20, 1983, within 90 days of the issuance to the petitioners of a Notice of Right to Sue announcing the conclusion of the administrative agency's process, the petitioners filed a pro se complaint. Pet. App. 18a. Subsequently, the petitioners retained counsel and filed an amended complaint pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., alleging that AT&T and Local 1942 had discriminated against the petitioners and other female workers[9] by

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[8] Section 706(f), 42 U.S.C. § 2000e-5(f).

[9] The petitioners brought a class action but the district court granted summary judgment without considering the (continued...)

conspiring to change the seniority rules "in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs," and that "[t]he purpose and the effect of this manipulation of seniority rules" were to advantage male over female workers. Joint App. 20-22.

The district court granted the Company's motion for summary judgment[10] because it deemed that the petitioners had failed to file their administrative charges with the EEOC within the applicable limitations period established by section 706(e) of Title VII, 42 U.S.C.

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[9](...continued)
issue of class certification. Pet. App. 6a n.1.

[10] Even though Local 1942 failed to file a motion for summary judgment, the district court sua sponte entered judgment in favor of the Union because the Company's "motion is equally effective in barring the claim against" the Union. Pet. App. 33a n.7.

§ 2000e-5(e).[11] The court ruled that the time period commences to run from "the date [the plaintiffs] were forced to

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[11] Section 706(e) establishes two time periods. The section provides that a charge "shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" except where the charging person "has initially instituted proceedings with a state or local agency" the charge "shall be filed ... within three hundred days after the alleged unlawful employment practice occurred...."

The Court of Appeals noted that "claims brought in Illinois are generally subject to a 300-day period of limitation" because "Illinois has a state [fair employment practices] agency to which employment complaints may be referred." Pet. App. 6a, n.2 While AT&T argued that Title VII's 180-day limitations period applies rather than its 300-day limitations period, the lower courts did not address that issue because under the analysis of the lower courts the petitioners' charges were untimely regardless of which period applied. Pet. App. 6a n.2, 19a-20a n.3.

Since Lorance and Bueschen filed charges on April 13, 1983, within 180 days of their demotions on November 15, 1982, their charges were timely filed eve. if the 180-day limitations period applies. See, n. 7, supra.

sacrifice their plant seniority rights under the 'Tester Concept.'" Pet. App. 32a. Since Lorance was a tester when the seniority system was changed in 1979 and since Bueschen and King became testers in 1980, their filing of EEOC charges in April 1983 exceeded the 300-day limitations period. Pet. App. 32a-33a n.6.

Although noting that the petitioners' contention that the limitations period commenced when they were demoted in 1982 has "immediate appeal," the district court rejected the argument because of its interpretation of United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). Pet. App. 25a. Also the district court rejected, Pet. App. 27a-31a, the magistrate's ruling, which AT&T had advanced, that the limitations period commenced for all petitioners when the

tester seniority policy was adopted. Pet. App. 43a-44a.

4. As did the district court, the court of appeals found that the petitioners' argument was "logically appealing" but nevertheless rejected the argument because the court "conclude[d] that the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory." Pet. App. 8a-9a. The court rejected the plaintiffs' argument that any adverse action taken pursuant to a discriminatory seniority system constitutes a discriminatory act because "employees could challenge a seniority system indefinitely" and such a ruling "would run counter to the strong policy

favoring the prompt resolution of discrimination disputes." Pet. App. 8a.

The court also rejected the argument advanced by AT&T and Local 1942 that the filing period must run from the adoption of the system because "[r]equiring employees to contest any seniority system that might some day apply to them would encourage needless litigation" and "would frustrate the remedial policies that are the foundation of Title VII." Ibid. The court believed that it had "str[uck] a balance that reflects both the importance of eliminating existing discrimination, and the need to insure that claims are filed as promptly as possible." Pet. App. 9a. Since the petitioners filed their EEOC charges more than 300 days after they had become subject to the seniority system, their claims were deemed time-barred.

Ibid.

Judge Cudahy dissented. He concluded that the court's decision did not serve the goal of ensuring the prompt resolution of challenges to seniority systems since challenges may be brought in the future by members of the class who are not currently subject to the seniority system. Moreover, the plaintiffs filed their charges when they were injured by their demotion; "[v]iewed in that direct and uncluttered fashion, their complaints were timely." Pet. App. 10a. Moreover, Judge Cudahy criticized the majority for encouraging premature or unnecessary lawsuits by requiring workers to file lawsuits before they have been injured and even though they may never be injured. Ibid.

The Seventh Circuit denied the plaintiffs' petition for rehearing and

suggestion for rehearing en banc, although three Judges, Cudahy, Easterbrook, and Ripple, voted to grant rehearing en banc. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

A. On seven different occasions the Court has considered the operation of an illegal seniority system as an "unlawful employment practice" under Title VII regardless of the date on which the system was adopted or the date on which the plaintiff initially became subject to the system. A seniority system is illegal if, as here, it is the product of an intent to discriminate.

Whenever the seniority system operated as intended by AT&T and Local 1942 to deny job opportunities to petitioners because of their gender, AT&T and Local 1942 committed an "unlawful employment practice." As this Court held

that each application of a discriminatory pay practice is "a wrong actionable under Title VII," Bazemore v. Friday, 478 U.S. 385, 395-96 (1986), so is each application of the discriminatory seniority practice. Therefore, the petitioners filed timely charges of discrimination because they filed those charges within 300 days of the date they were harmed by an "unlawful employment practice," that is by the operation of the discriminatory seniority system.

B. The Seventh Circuit's rule that a worker must file a charge within 300 days of initially becoming subject to a discriminatory seniority system even though the system has not been applied and may never be applied to the detriment of the worker will serve to hinder the effective and efficient implementation of Title VII. The requirement that a worker

must file premature and possibly unnecessary litigation about the hypothetical application of a newly instituted practice is particularly inappropriate in view of the fact that Congress established cooperation and voluntary compliance as the preferred approaches for achieving equal employment opportunity.

Moreover, the legislative history of the 1972 amendments to Title VII confirms that Congress intended to adopt the "continuing violation" principle whereby a victim of discrimination may timely file from the "last occurrence" of an unlawful system rather than from the adoption of or "first occurrence" of the system. Such a principle is particularly appropriate where "untrained laymen" initiate the process for enforcing Title VII.

Furthermore, this Court has

recognized the importance of interpreting the limitations provisions applicable to remedial legislation similar to Title VII to permit timely challenges to the operation of long-established illegal practices. The Court has held that the continuing operation of practices in violation of laws designed to protect civil rights, such as the Fair Housing Act of 1968, or prevent unfair business activities gives rise to a cause of action whenever that operation causes harm. Similarly, the Court should hold that the operation of a discriminatory seniority system violates Title VII and gives rise to a cause of action whenever that ongoing operation harms a worker.

ARGUMENT

FEMALE WORKERS MAY FILE A TIMELY TITLE VII CHARGE WITHIN 300 DAYS OF THEIR JOB DEMOTION DUE TO THE OPERATION OF A DISCRIMINATORY SENIORITY SYSTEM DESIGNED TO ADVANTAGE MALE WORKERS OVER FEMALE WORKERS.

A. The Court's Decisions Make Clear That a Worker Harmed by the Operation of a Discriminatory Seniority System Is Permitted To File a Charge Within 300 Days of the Date of that Harm.

1. Section 706(e) of Title VII requires that a worker alleging discrimination file a charge with the Equal Employment Opportunity Commission "within three hundred days after the alleged unlawful employment practice occurred...." (Emphasis added); see, n. 11, supra. The filing of a timely charge is a requirement for filing a lawsuit in federal court.[12]

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[12] In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the Court held "that filing a timely charge of discrimination with the EEOC is

(continued...)

AT&T committed an "unlawful employment practice" when it operated its discriminatory seniority system to demote Lorance, Bueschen, King and other women to lower paying jobs while retaining male employees in the higher paying jobs. Since Lorance, Bueschen and King filed charges within 300 days of their job demotions, their charges were timely filed.

This Court has held unanimously that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." Bazemore v.

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[12](...continued)
not a jurisdictional prerequisite to sue in federal court, but a requirement that, like a statute of limitations is subject to waiver, estoppel, and equitable tolling."

Friday, 478 U.S. at 395-96. Like each operation of a discriminatory pay system which adversely affects employment opportunities or benefits, each operation of a discriminatory seniority system is an unlawful employment practice.

In Bazemore the Court explained that the employer's establishment of the discriminatory pay system "prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the [employer] became covered by Title VII." 478 U.S. at 395, (emphasis in original). Similarly, the fact that AT&T and the Union adopted a discriminatory seniority system before 300 days from the filing of the charges does not immunize acts perpetuating that discrimination occurring within 300 days from the filing of the charge.

2. The statutory definition of

"unlawful employment practice" requires the conclusion that each application of the discriminatory seniority system to the detriment of a female worker is an actionable wrong. Section 703 provides that

> (a) It shall be an unlawful employment practice for an employer -
>
> (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin. (Emphasis added).

In holding that a worker must file a charge within 300 days of becoming "subject" to the discriminatory seniority system, Pet. app. 9a, which in the case of

Lorance is the "adoption" of the system, in effect the Seventh Circuit reads section 703(a)(2) as making an "unlawful practice" only the "adoption" or the initial subjection of a worker to the challenged practice. The Seventh Circuit's interpretation of "unlawful practice" permits a challenge to the adoption of a practice established to discriminate against female workers but immunizes the actual application of the practice to "deprive" female workers of job opportunities. The lower court's standard fails to apply the language in section 703(a)(2) proscribing all practices which "deprive" female workers of employment opportunities or "otherwise adversely affect" employment opportunities of female workers because of their gender.

The illogic of the lower court's analysis is apparent. For example, let us

assume that job demotions in the AT&T plant are based upon a decision by a supervisor rather than upon the operation of a seniority system. If the supervisor decides to demote female rather than male workers to lower-paying positions because the higher-paying jobs were "traditionally male" jobs, then there is no question but that the female workers could file a charge within 300 days from the application of this unlawful practice. The fact that the job demotions of the female workers were due to the operation of a systematic and intentionally designed plan to protect the male workers in their "traditional" jobs rather than the aberrant decision of a discriminatory supervisor should not preclude the female workers from filing timely charges within 300 days of their job demotions.

To insulate from challenge the

ongoing operation of systematic and planned discrimination established in a seniority system designed to protect job advantages of male workers over female workers runs counter to a fundamental purpose of the fair employment law.

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white [or male] employees over other employees. Under the Act, practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), (emphasis added).

3. This Court's decisions regarding the legality of seniority systems make clear that the operation of an illegal seniority system is an unlawful employment

practice regardless of the date when the system was established. In Teamsters v. United States, 431 U.S. 324 (1977), the Court first considered whether the perpetuation of prior discrimination by a seniority system which adversely affected the opportunities of black workers was illegal.

The Court described the discriminatory consequences of the seniority system.

> An example would be a Negro who was qualified to be a line driver in 1958 but who, because of his race, was assigned instead a job as a city driver, and is allowed to become a line driver only in 1971. Because he loses his competitive seniority when he transfers jobs, he is forever junior to white line drivers hired between 1958 and 1970. The whites, rather than the Negro, will henceforth enjoy the preferable runs and greater protection against layoff. Although the original discrimination occurred in 1958 -- before the effective date of Title VII -- the seniority system operates to carry the

> effects of the earlier discrimination into the present.

431 U.S. at 344 n. 27, (emphasis added). The operation of the AT&T-Union seniority system is indistinguishable from the operation of the system in Teamsters. Under the AT&T system, females assigned to "traditionally female" jobs are forced to forfeit their plant seniority when they move into the tester positions. Female workers are thereby junior to the male workers who were hired into the plant after the female workers. Thus, during a reduction-in-force the seniority system operates to carry forward to the present the effects of the earlier division of jobs by gender and causes the female workers to be demoted to lower-paying jobs rather than the male workers who have less plant seniority than the female workers.

In Teamsters the Court rejected the lower court's straightforward application

of Griggs to the seniority system. "Were it not for § 703(h),[13] the seniority system in this case would seem to fall under the Griggs rationale." But the Court held that section 703(h) only "extended a measure of immunity to" seniority systems. 431 U.S. at 349-50. Section 703(h) "does not immunize all seniority systems" because it only protects "bona fide" systems which do not cause differences in treatment which are "the result of an intention to discriminate...." Teamsters, 431 U.S. at 353, quoting section 703(h).

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13 Section 703(h) provides in pertinent part: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin...."

The seniority system in Teamsters was "entirely bona fide" because "[i]t is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." 431 U.S. at 355-56. The contentions in Lorance are to the contrary. The female workers maintain that the seniority system was designed by the IBEW and the Company in order to protect the discriminatory job advantage gained by the male over female workers during the period when the plant included "traditionally" female and male jobs.

Pursuant to the analysis in Teamsters, the Court would have held the operation of the seniority system at issue in Teamsters an "unlawful employment practice" if the system had been established or maintained with an intent

to discriminate even though the system was established prior to the effective date of Title VII. "As § 703(h) was construed in Teamsters, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system." Pullman-Standard Co. v. Swint, 456 U.S. 273, 289 (1982), (emphasis added).[14]

Where a seniority system is the product of an intent to discriminate, its application to the disadvantage of those persons against whom the intentional discrimination was directed is an unlawful employment practice. Teamsters, supra; Pullman-Standard Co., supra; American

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[14] As in Teamsters the seniority system at issue in Swint was adopted many years prior to the effective date of Title VII. 456 U.S. at 278. The differential treatment caused by the operation of the seniority system in Swint resulted from a system adopted many years before it was possible to file charges of discrimination.

Tobacco Co. v. Patterson, 456 U.S. 63, 69-70 (1982) ("Such application [of a seniority system] is not infirm under § 703(h) unless it is accompanied by a discriminatory purpose."); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977) ("[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.")

Two decisions by the Court illustrate that workers may challenge as an unlawful employment practice the operation of a long-established seniority system. In California Brewers Association v. Bryant, 444 U.S. 598 (1980), the Court considered whether a particular contractual provision[15] was part of a seniority system

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[15] The provision afforded greater benefits to "permanent" than to

(continued...)

protected by section 703(h). The Court concluded that the provision was part of a seniority system but remanded the case to the lower court in order to permit the plaintiffs to establish that the system was not "bona fide," 444 U.S. at 610-11, even though the provision is part of a collective bargaining "agreement negotiated more than 20 years ago." 444 U.S. at 602.

In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the Court ruled illegal the company's practice requiring female employees returning to work following pregnancy leave to forfeit their accumulated seniority while not requiring

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[15](...continued)
"temporary" employees. In order to become a permanent employee, a temporary employee had to work at least 45 weeks in a particular year. Since minority employees were disproportionately "temporary" employees, the provision adversely affected the employment opportunities of minority employees.

such seniority forfeiture by employees returning from disability leave. Although hired in 1969 and subject to the practice for years, the plaintiff did not challenge the practice until she was denied her accumulated seniority when she returned from pregnancy leave in 1973.

Under the Seventh Circuit's Lorance rule neither Bryant nor Satty would have been permitted to challenge the operation of these seniority systems years after the systems were adopted and after the plaintiffs became subject to these seniority practices.

In the one decision in which the Court considered the application of the limitations provision to the current operation of a discriminatory seniority system, the Court endorsed the principle argued for by the petitioners. The Court determined that Title VII "does not

foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." United Air Lines v. Evans, 431 U.S. at 560. In United Air Lines the Court held that the challenge to the operation of the particular seniority system was not timely because plaintiff Evans did not challenge the legality of the system itself. Ibid.; see, Bazemore, 478 U.S. at 396 n. 6.

Unlike Lorance, Evans did not assert that the seniority system itself was illegal but merely that the system perpetuated the effects of the illegal policy of forced termination which the company no longer applied.[16] However,

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[16] Evans had been forced to resign by United Air Lines' policy of refusing to employ pregnant stewardesses. After rehire, Evans complained that the company discriminated against her by failing to count her seniority from her prior employment.

Lorance complains that the seniority system itself is discriminatory because it is the product of a conspiracy by AT&T and Local 1942 to protect the job positions of male workers and to discourage female workers from transferring into jobs in the tester universe which were viewed as men's jobs. Since Lorance claims that the system is not bona fide because there was an "actual intent to discriminate ... on the part of those who negotiated ... the system," Pullman-Standard Co. v. Swint, 456 U.S. at 289, which makes the system "subject to challenge as [illegally] discriminatory," the petitioners may challenge "the current operation of [the] seniority system[ ]." United Air Lines v. Evans, 431 U.S. at 560.[17]

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[17] Also the Seventh Circuit errs on relying upon Delaware State College v. Ricks, 449 U.S. 250 (1980), to conclude that the charges were untimely filed.
(continued...)

The decision in United Air Lines follows from the Court's interpretation of section 703(h) in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). In Franks the Court held that the section does not preclude the award of retroactive seniority as a remedy to applicants who were discriminatorily denied hire after the effective date of Title VII. In so doing the Court concluded that § 703(h) is

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17(...continued)
Ricks complained that he was discriminatorily denied tenure but did not file a timely charge from the date of the adverse tenure decision. Rather, he argued that he continued to suffer harm during the one year he worked pursuant to a termination contract. The Court rejected the argument because the "termination of employment ... is a delayed, but inevitable, consequence of the denial of tenure.... [T]he only alleged discrimination occurred -- and the filing limitations periods therefore commenced -- at the time the tenure decision was made...." 449 U.S. at 257-58. Unlike the pay practice in Bazemore and the seniority system in Lorance, no current discriminatory practice was alleged in Ricks.

"only a definitional provision" which, like "other provisions of § 703 ... delineates which employment practices are illegal ... and which are not." As such, section 703(h) does not "limit[ ] or qualif[y] the relief authorized" by Title VII "in circumstances where an illegal discriminatory ... practice is found." 424 U.S. at 758-59.

As section 703(h) does not limit the scope of remedy available under section 706(g), the remedial section of Title VII, so it does not limit the reach of the filing periods provided by section 706(e). Rather, "the thrust of [section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the

effective date of the Act." (Emphasis added) 424 U.S. at 761.

Therefore, beginning with Franks the Supreme Court on seven occasiors[18] has considered the operation of an illegal seniority system as an "unlawful employment practice" regardless of the date on which the system was adopted or the date on which the plaintiff initially became subject to the system. Accordingly, pursuant to section 706(e) employees, as did the petitioners, may file a timely charge within 300 days of suffering harm from the operation of a discriminatory seniority system -- the "unlawful employment practice."

4. Other than the Seventh Circuit

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18 Teamsters v. United States, supra; United Air Lines v. Evans, supra; Trans World Air Lines v. Hardison, supra; California Brewers Association v. Bryant, supra; American Tobacco Co. v. Patterson, supra; Pullman-Standard Co. v. Swint, supra.

in Lorance, each appellate court which has applied the limitations provisions to a seniority system has held "that the alleged discriminatory violations [caused by a seniority system] must be classified as continuous ones, giving rise to claims accruing in favor of each plaintiff on each occasion when the [system is] applied...." Cook v. Pan American Airways, Inc., 771 F.2d 635, 646 (2d Cir. 1985), cert. denied, 474 U.S. 1109 (1986).[19] See also, Morelock v. NCR

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19 The Second Circuit applied the legal principles governing the timeliness of Title VII charges to determine the timeliness of a case filed pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 et seq. Cook v. Pan American World Airways, Inc., 771 F.2d at 646. The Second Circuit's application of Title VII principles to the filing requirements of the ADEA is consistent with this Court's opinions. Zipes v. Trans World Airlines, 455 U.S. at 395 n.11 (Congress modeled the filing requirement in the ADEA after the Title VII requirement); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). See (continued...)

Corp., 586 F.2d 1096, 1103 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979); Patterson v. American Tobacco Co., 634 F.2d 744, 751 (4th Cir. 1980), vacated on other grounds, 456 U.S. 63 (1982).

"Most circuit courts have ... rejected [the Seventh Circuit's] analysis [in Lorance]. They have reasoned, instead, that the application of a discriminatory system to a particular substantive decision (e.g., to promote, demote, fire, or award benefits) constitutes an independent discriminatory act which can trigger the commencement of the statute of limitations." Johnson v. General Electric, 840 F.2d 132, 135 (1st Cir. 1988). See e.g., Stoller v. Marsh,

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[19](...continued)
also, Bruno v. Western Electric Co., 829 F.2d 957, 960 n.1 (10th Cir. 1987) ("[T]he application of the continuing violation theory [is] the same for ADEA and Title VII cases....").

682 F.2d 971, 978-79 (D.C. Cir. 1982), cert. denied, 460 U.S. 1037 (1983); EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 219 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984); Taylor v. Home Insurance Company, 777 F.2d 849, 856 (4th Cir. 1985), cert. denied, 476 U.S. 1142 (1986); Abrams v. Baylor College of Medicine, 805 F.2d 528, 534 (5th Cir. 1986); Satz v. ITT Financial Corp., 619 F.2d 738, 743-44 (8th Cir. 1980); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924-25 (9th Cir.), cert. denied, 459 U.S. 971 (1982); Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1543 (10th Cir. 1987) ("A claim of age discrimination ... may be based on a continuing policy and practice of discrimination that began before the statutory filing period, as long as the employer continues to apply the discriminatory policy ... to a point

within the relevant filing period....").[20]

B. The Effective and Efficient Implementation of Title VII Requires that a Worker Be Permitted To File a Timely Charge from the Date the Worker Is Harmed by the Operation of a Discriminatory Seniority System.

As the First Circuit stated, the Lorance decision is "unreasonable, as well as undesirable from a public policy perspective." Johnson v. General Electric, 840 F.2d at 136, (footnote omitted).

1. The Seventh Circuit's decision requires employees to file premature and often unnecessary lawsuits in order to preserve their right to challenge

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20 Consistent with the overwhelming weight of judicial authority, the Equal Employment Opportunity Commission has advised its staff in its Interpretative Manual that the operation of an illegal practice, such as a seniority system, is a present violation of Title VII from which an employee may file a timely charge. Bureau of National Affairs, EEOC Compliance Manual at Volume 2, §§ 605.6, 605.7(a), 616.14(b).

discriminatory seniority or other systems which may or may not harm their job opportunities in the future. If an employee becomes subject to an arguably discriminatory standard, the Lorance rule requires the employee to file a charge with the EEOC within 300 days even though the standard may never be applied to the detriment of the employee.[21]

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21 In addition to leading to the filing of premature and unnecessary lawsuits, the Lorance rule will cause employees to file charges with the EEOC which the employees might otherwise not file before they have been harmed. These additional and unnecessary charges will serve to overload further an already overburdened system.

In fiscal year 1987 more than 115,500 charges of discrimination were filed with the EEOC or with state and local fair employment agencies. United States General Accounting Office, Equal Employment Opportunity - EEOC and State Agencies Did Not Fully Investigate Discriminatory Charges (1988) at 10. The EEOC and the local agencies are unable to keep pace with the current level of charge filings. "By the end of fiscal year 1987, EEOC's backlog had increased to

(continued...)

Petitioner Lorance's situation provides a good example of how the Seventh Circuit's rule may lead to the filing of unnecessary EEOC charges and lawsuits. Lorance became a tester in October 1978, Joint App. 22, and became subject to the discriminatory "tester universe" seniority system when it was adopted in July 1979. As previously described, the discriminatory part of the system was the shift of the measure of seniority from plant service to tester job service to

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[21](...continued)
about 62,000 charges [and the backlog of the local agencies to] about 56,000 charges that they were responsible for processing under EEOC work-sharing agreements." Id. at 17.

Moreover, in approximately 40% to 85% of the instances in which the EEOC and the local agencies closed charges on the basis of findings of no reasonable cause to believe discrimination occurred, the General Accounting Office found that partly as a result of the large number of charges the agencies had failed to investigate fully the charges as provided for by EEOC guidelines. Id. at 3, 21-35.

govern job promotions and demotions. However, the agreement provided that after five years of service as a tester an employee's promotions and demotions would once again be based upon her plant seniority. See n.6, supra.

Since Ms. Lorance had served as a tester for four years prior to her demotion in November 1982, she almost completed the entire five-year period under the discriminatory seniority forfeiture provision without being harmed by a demotion. Moreover, as a result of any number of other possible events, such as another change in the system or a promotion to a position not covered by the seniority agreement, see n.1, supra, Ms. Lorance or the other petitioners may never have been harmed by the

discriminatory practice.[22]

A worker should not be required to use "some mystical powers of omniscience," EEOC v. Westinghouse Electric Corp., 725 F.2d at 220, in order to determine if she should file a charge because a recently implemented discriminatory policy may in the future limit her job opportunities. A worker may reasonably decide that it is better not to tilt at hypothetical windmills. It is certainly not in the interest of the efficient implementation of Title VII or the administration of the judicial system to force workers to increase the burden on already overcrowded administrative and judicial dockets by

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[22] Unlike the tenure denial in Ricks, which commenced the running of the statute of limitations since the termination of employment "inevitabl[y]" followed from the denial, 449 U.S. at 257-58, the demotion of Lorance or any other particular female worker was not the "inevitable" consequence of the adoption of the discriminatory seniority system.

filing premature and possibly unnecessary charges and complaints. "It is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all." Johnson v. General Electric, 840 F.2d at 136.

2. It is particularly inappropriate to establish a filing rule that requires premature and possibly unnecessary litigation about the hypothetical application of a newly instituted practice since Congress established "[c]ooperation and voluntary compliance ... as the preferred means for achieving [Title VII's] goal." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). The Lorance rule requires workers to confront immediately their employers and unions about newly established practices rather than attempt to accommodate or adjust to

those practices in a manner which might avoid the loss of employment opportunities and litigation.

For example, Lorance attempted to serve her five-year period as a tester in order to regain her plant seniority for the purpose of job movement. By serving four out of the necessary five years before her demotion, she almost succeeded in attaining her goal without filing a lawsuit against her employer and union. Moreover, consistent with the goals expressed in Alexander, workers who face potential harm from a seniority system may attempt to have the system changed by negotiation. However, if the Seventh Circuit decision stands, the lesson for workers will be clear: If you are confronted with an arguably discriminatory system you must sue immediately or forever lose your right to challenge the practice,

even if you think that you might avoid the discriminatory operation of the system.[23]

3. Where, as here, the Company and the Union negotiators intended that the seniority system advantage male over female workers for job opportunities in the "traditionally" male tester jobs, it is "anomalous to deny [by an application of the charge filing requirements of Title

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[23] The impractical operation of the Lorance rule is illustrated by the example of an imposition of an educational requirement for promotion which is arguably unlawful because it disqualifies disproportionately more blacks than whites and it is not "job related." See, Griggs v. Duke Power Co., supra. Absent the confrontational Lorance rule, an employee might decide to attempt to earn the required educational degree in order to qualify for the next promotional opportunity. Rather than encouraging accommodation, the Lorance rule requires the worker to sue his company regarding the imposition of the new standard even before it is applied and even though the worker might avoid any discriminatory consequences of the practice by earning the educational degree prior to the next promotional opportunity.

VII] any prospect of enforcement in the very cases in which the need may be the greatest." Jackson and Matheson, The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits, 67 Geo. L. J. 811, 831 (1979). Especially where the defendants have intentionally established a discriminatory system, the "defendant[s] ha[ve] no interest that merits protection when [they] maintain[ ] a continuing policy of discrimination," even though the policy affecting a given employee was established more than 300 days earlier than the filing of the charges. Id. at 851.

Congress did not intend to have the charge filing requirements in Title VII serve as a shield against any challenges to the operation of a discriminatory seniority or other system

filed more than 300 days after the adoption of the system or after the complaining employee became subject to the system. In amending Title VII in 1972,[24] Congress extended the time periods in section 706(e) for filing charges with the EEOC from 90 days to 180 days and from 180 days to 300 days where the charge is initially filed with a state or local government agency.

The primary legislative history expressing the intent of Congress in amending section 706(e) is contained in a section-by-section analysis of the bill agreed to by the conference committee of the House of Representatives and the Senate. This analysis was submitted to the Senate by Senator Williams, who was Chairman of the Senate conferees, and to

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[24] Equal Employment Opportunity Act of 1972, March 24, 1972, P.L. 92-261, 86 Stat. 103.

the House of Representatives by Representative Perkins, who was Chairman of the House conferees, just before the vote was taken approving the bill as reported out by the conference committee.[25]

> This subsection [706(e)] as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the

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[25] 118 Cong. Rec. 7166-70 (March 6, 1972) and 118 Cong. Rec. 7563-73 (March 8, 1972), reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (GPO 1972) at 1843-75 (Legislative History).

> last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.

118 Cong. Rec. 7167 (March 6, 1972), reprinted in Legislative History at 1846. As the section-by-section analysis of the conference bill shows,[26] the amended

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[26] In its legislative history of the 1972 Act, the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare emphasized the importance of the section-by-section analysis of the conference bill submitted to the Senate and the House of Representatives. "These analyses are particularly relevant as they represent a more detailed explanation of all the provisions of the bill as viewed by the sponsors and legislative leaders." Legislative History at xv n. 3.

Furthermore, the legislative history of the 1972 Act is directly pertinent to the proper interpretation of section 706(e) because section 706(e) was amended and reenacted in 1972. See, Connecticut v. Teal, 457 U.S. 440, 447 n. 8 (1982); Franks v. Bowman Transportation Co., 424 U.S. at 764 n. 21; Albemarle Paper Co. v. Moody, 422 U.S. 405, 420-21 (1975); Johnson v. Railway Express Agency, 421 U.S. 457, 459 (1975); compare, Teamsters v. United States, 431 U.S. at 354 n.39

(continued...)

section 706(e) was intended to adopt the "continuing violation" analysis whereby a victim may timely file from the "last occurrence" of the unlawful practice.[27] Accordingly, Lorance and the other petitioners should be entitled to file a timely charge from the date of the "last occurrence" of the discriminatory system

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[26](...continued)
("[T]he section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII ... are entitled to little if any weight.")

[27] Moreover, it is clear from the 1972 amendment to § 706(g), 42 U.S.C. § 2000e-5(g), to provide that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge," that Congress approved the continuing violation principle. Only by permitting courts to remedy continuing violations, such as the operation of a discriminatory seniority system, can the Court give effect to both the 300-day charge filing period and the two-year period for the award of back pay. See, Albemarle Paper Co. v. Moody, 422 U.S. at 410 n. 3.

which resulted in their demotion to lower-paying positions.

4. This Court has recognized the appropriateness of interpreting the limitations provisions of remedial legislation similar to Title VII to permit timely challenges to the operation of continuing discriminatory practices even if the practices had been established long before the coverage of the limitations period.

Under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq., a civil rights statute similar in purpose and design to Title VII, the Court interpreted the limitations provision[28] as permitting

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[28] The Fair Housing Act provision, 42 U.S.C. § 3612(a), which like Title VII requires the filing of an administrative charge within 180 days of the discriminatory act, "is comparable to the one imposed by the Age Act [and by Title VII]." Taylor v. Home Insurance Company, 777 F.2d at 856.

the filing of a timely charge from the continued operation of a discriminatory practice. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982). The Court determined that "a 'continuing violation' ... should be treated differently from one discrete act of discrimination." Id. at 380.

If there is a continuing practice of racial steering, a court may remedy instances of discriminatory steering which occurred prior to the 180-day period for filing an administrative charge so long as at least one application of the steering practice occurred within the filing period. "Where the challenged violation is a continuing one, the staleness concern [of statutes of limitations] disappears." Ibid. Moreover, to "ignore[ ] the continuing nature of the alleged violation ...

undermines the broad remedial intent of Congress...." Ibid.

Similarly, an illegal system for distributing shoe machinery instituted in 1912 was subject to a timely suit in 1955. The conduct "constituted a continuing violation of the Sherman Act ... which inflicted continuing ... harm on Hanover [the victim of the illegal system]." Hanover Shoe v. United Shoe Machinery, Inc., 392 U.S. 481, 502 n.15 (1968). Thus, "[a]lthough Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." Ibid. See also, Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 338-39 (1971) (continuing conspiracy to restrain trade); Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) (continuing illegal pay scales).

A discriminatory seniority

system such as the one designed by AT&T and Local 1942 violates the law and gives rise to a cause of action whenever its continuing operation harms a female employee just as does the continuing operation of an illegal racial steering practice, monopolistic system, conspiracy in restraint of trade, or gender-based pay system. See, Laycock, Continuing Violations, Disparate Impact in Compensation and other Title VII Issues, 49 Law and Contemp. Probs. 53 (1986).

This Court's decision in International Ass'n of Machinists v. NLRB, 362 U.S. 411 (1960) ("Bryan Manufacturing") does not, as AT&T appears to argue, Br. in Opp. 7, establish a contrary rule for labor cases. Bryan Manufacturing concerned a challenge to a union security clause which was enacted at a time when the union did not represent a

majority of the employees in the unit. The only unfair labor practice alleged was the execution of the agreement at a time when the union lacked majority status. The "collective bargaining agreement and its enforcement are both perfectly lawful." 362 U.S. at 419.

The Court ruled that the claim of unfair labor practice was untimely under the National Labor Relations Act, 29 U.S.C. § 160(b) because the only challenge to the enforcement of the union security clause was based upon the status of the union at the time of the execution of the contract. Since a challenge to the method of execution of the contract was no longer timely, the unfair labor practice claim was dismissed. 362 U.S. at 417.

In this case, the collective bargaining provision itself is illegal, not just the manner by which it was

executed. A seniority provision which was intentionally designed to discriminate against women is neither bona fide nor lawful. See, section A, supra. In fact, lower courts have applied the Title VII continuing violation rule to labor cases "where the conduct challenged ... involves a continuing and allegedly improper practice that causes separate and recurring injuries to plaintiffs...." Sevako v. Anchor Motor Freight, Inc., 792 F.2d 570, 575 (6th Cir. 1986); Lewis v. Local Union No. 100 of Laborers' International, 750 F.2d 1368, 1379-80 (7th Cir. 1984).

If, for example, the only practice challenged in Lorance were the exclusion of women from a union meeting when the contract was considered, the challenge, like the one in Bryan Manufacturing, would be to the manner by which the contract

was executed. If the resulting contract were not designed to discriminate against women and if the contract, in fact, did not discriminate, then the operation of the contract would not be a continuing violation. Women could challenge their discriminatory exclusion from the meeting but not the operation of the contract since, as in Bryan Manufacturing, the contract and its enforcement would be "perfectly lawful."

But that is not the case in Lorance. The seniority forfeiture clause negotiated by AT&T and Local 1942 was intended to deny employment opportunities to women. Whenever that illegal clause operates to serve the defendants' discriminatory intent, there is a violation of Title VII.

5. In the section-by-section analysis of the conference committee bill which was enacted into law, there was an

explicit recognition that courts should apply the Title VII filing requirements in view of the fact that "frequently" the persons who file the charges "are untrained laymen." 118 Cong. Rec. 7167 (March 6, 1972), reprinted in Legislative History at 1846. In so doing, Congress endorsed this Court's conclusion in a decision rendered shortly before the enactment of the Equal Employment Opportunity Act of 1972 that the creation of procedural "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman Co., 404 U.S. 522, 527 (1972); see also, Zipes v. Trans World Airlines, 455 U.S. at 397.

The Seventh Circuit's rule in Lorance is a trap for laypersons. It is understandable that a person, such as

Lorance, who had recently promoted to a traditionally male tester job would not have thought to file a charge merely because of a change in the seniority system under which she was employed. A layperson naturally may think to challenge an employment decision, such as a job demotion, which actually adversely affects her position. If the Seventh Circuit's Lorance decision remains undisturbed, then many more laypersons, like Lorance, Bueschen and King, will fall into the trap of not filing charges until their job positions are affected by discriminatory practices, and many more intentional discriminators, like AT&T and Local 1942, will avoid the proper legal consequences of their intentional discrimination.

CONCLUSION

The petitioners respectfully request

that the Court reverse the judgment of the Seventh Circuit and hold that the petitioners filed timely charges within 300 days of the demotions caused by the operation of the discriminatory seniority system.

Respectfully submitted,

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December 9, 1988

RESPONDENT'S

BRIEF

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QUESTION PRESENTED

Whether, notwithstanding the 180-day statute of limitations, Title VII of the Civil Rights Act of 1964 permits individual employees *indefinitely* to challenge the legality of a facially neutral seniority system that has been nondiscriminatorily administered and maintained by alleging that the system was illegally "adopted" with a discriminatory motive years or decades earlier?

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No. 87-1428

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PATRICIA A. LORANCE, et al.

Petitioners,

v.

AT&T TECHNOLOGIES, INC. and
LOCAL 1942, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF*

STATEMENT OF THE CASE

Introduction

The question presented in this case is whether, despite the 180-day statute of limitations, Title VII permits individual employees *indefinitely* to challenge the legality of a neutral seniority system that has been nondiscriminatorily administered and maintained for years or decades—by alleging that the "initial adoption" of the system was tainted by a discriminatory motive and was thus "illegal."

The issue arises in a case in which a union and an employer entered into an agreement, in 1979, that did two things. It replaced a plant-wide seniority system with a departmental seniority system, and also required the employer to provide educational

*The Rule 28.1 Statement appears at p. ii of the Opposition to the Petition for Certiorari.

and other benefits to the affected employees. This agreement was subject to heated debate before it was approved by the union's membership because employees recognized that the modification of vested seniority rights constituted an immediate loss and would inevitably alter the allocation of job benefits. Petitioners believed in 1979 that the abrogation of their existing plant-wide seniority rights constituted intentional sex discrimination. Yet petitioners did not file EEOC charges or bring this suit until after the modified seniority system had operated for years and after petitioners' co-workers and the employer had irrevocably changed their positions in reliance on the 1979 agreement. This suit was brought to dismantle the departmental seniority system and to reinstate the plant-wide seniority system that was replaced in 1979.

The departmental seniority system is neutral in its operation. The *sole* basis for petitioners' challenges is that the plant-wide system was illegally abrogated with a discriminatory motive in 1979. Thus, petitioners and EEOC claim that the question of the company's and the union's motive in 1979 (and the lawfuiness of the system) can be litigated anytime the seniority system is "applied" to allocate job benefits, be that 1983, 1993, or 2083.[1] As the facts of this case illustrate, this epitomizes the litigation of stale claims that the statute of limitations is designed to bar. Petitioners' and EEOC's rule would further destroy the "legitimate expectations" of innocent co-workers and also subvert collective bargaining, contrary to the purposes of Section 703(h) of the Act.

1. **Background.** This case arises at the Montgomery Works facility of AT&T Technologies ("AT&T"), which is located in Aurora, Illinois. At Montgomery Works, AT&T manufactures electronic components used in data processing and data communications. J.A. 17-18, ¶ 9. The 1500 hourly workers at Montgomery Works are represented by Local 1942 of the International Brotherhood of Electrical Workers (the "Union"). J.A. 13-14, 17,

[1]See Petitioners' Brief ("Pet. Br."); Brief For The United States And The Equal Employment Opportunity Commission As Amici Curiae Supporting Petitioners ("EEOC Br.").

¶¶ 6(a), 8. Approximately 1100 of these 1500 union members are women. R.68B at 117.

Among the highest paid hourly positions at this AT&T plant are the 200 to 250 'tester" jobs, which comprise job grades 35-39 and are collectively referred to as the "Tester Universe." J.A. 18-19, ¶¶ 10-11, 13. The lower-paid non-tester production jobs comprise grades 32-35. *Id.* Tester jobs are highly technical and require special skills. No person may become a tester unless he or she takes college-level electronics courses and passes AT&T's Montgomery Electronics Test. J.A. 19-20, ¶ 13; R.68B-1, Ex. 15. It is undisputed that these educational and testing requirements are job-related. R.68A at 11-12; R.68B at 19-20.

Prior to 1979, all job promotions, downgrades, and layoffs for the Montgomery Works hourly employees were governed by "plant-wide seniority," an employee's total length of service with AT&T. J.A. 20, ¶ 15. Thus, any employee in the production job grades could theoretically have satisfied the educational requirements for tester jobs, exercised his or her plant-wide seniority to be promoted into the tester universe, and had this plant-wide seniority govern future promotions and demotions within the tester universe. As a practical matter, however, this did not occur. Few such workers undertook the necessary course work to obtain tester jobs, and these tester jobs were, for entirely lawful reasons,[2] historically filled by sufficiently-skilled males who were hired "off the street" (and by a "few males" who first held lower-graded non-tester jobs). J.A. 19, ¶ 12.

Beginning in 1970, a few females in lower-graded production jobs prepared for and passed the Montgomery Test, and then exercised their seniority rights to become testers. By 1978, there were approximately 15 such female testers. J.A. 19, ¶ 13.

[2]Contrary to Petitioners' Brief (pp. 33, 35), it has never been alleged that AT&T engaged in sex discrimination in its past hiring of testers. The fact that testers were predominantly males simply reflected that it was males who enrolled in electronics courses and passed the test. There is nothing in the pleadings nor the record indicating that this disparity had anything to do with AT&T or the Union. See R.68B at 18-19, 161.

Because plant-wide seniority then governed eligibility for all job movements, the fact that employees with experience in production jobs were, for the first time, becoming testers produced changes in the expertise of employees in the higher grades within the tester universe. As a practical matter, length of service as a tester had formerly governed all promotions within the tester universe. The reason was that in almost all cases, employees had no prior plant experience when they became testers. See J.A. 19, ¶ 12. However, because several employees with prior plant seniority had become testers, employees with little or no tester proficiency were promoted to higher grade tester jobs ahead of employees with longer experience as testers. J.A. 21, ¶ 16. This occurred at a time when these tester positions were requiring ever-increasing technical knowledge and skills.

2. **The 1979 "Changeover" From Plant-wide To Departmental Seniority.** In late 1978 and 1979, the Union and AT&T engaged in collective bargaining to address these and other problems. Cert. App. 4a. The result was an agreement to modify the collective bargaining agreement by adopting a "Tester Concept." J.A. 50-56. This was a package of interrelated provisions that addressed traditional employer concerns (by establishing separate seniority lists for skilled and unskilled workers) and that contained educational benefits for the class of employees that the three petitioners have sought to represent. *Id.*

There were three aspects to the 1979 Tester Concept. First, the 1979 Tester Agreement made it easier for lower grade production employees (nearly all of whom were women) to become testers. AT&T agreed to provide an "open laboratory" training program for production employees who desired to become testers. J.A. 54-55, ¶ M. Employees who successfully completed this program would receive three hours of college credit, which could qualify the employee to take the Montgomery Electronics Test. *Id.* AT&T also agreed to continue counseling those employees training to become testers. J.A. 55, ¶ N. Qualifications for these programs were gender-neutral.

Second, the 1979 Tester Agreement provided educational benefits to employees who had become testers and established educational requirements affecting promotion to the higher tester grades. J.A. 51, 53-54, ¶¶ A(3), H, K, L. The agreement required AT&T to establish special ongoing educational programs for employees who had recently become testers. These programs consisted of five modules of instruction in advanced electronics, data processing, and data communications,[3] which concededly are all job-related for the higher grades of testers. J.A. 57-58; R.68A at 18; R.68B at 92; R.68C at 156. Although exceptions were made for two of the petitioners,[4] the agreement provided that employees would ordinarily have to pass the five modules before they could be promoted to the higher tester positions (grades 37-39). J.A. 51, ¶ A(3).[5] Each petitioner enrolled in these training modules shortly after her entry into the tester universe. R.68A at 20; R.68B at 12; R.68C at 39, 154-56.

Third, the agreement abolished the plant-wide seniority system insofar as it governed promotions, or any downgrades, within the tester universe. J.A. 21, ¶ 17; J.A. 45-46; J.A. 51, ¶ A(1). It provided that all employees at Montgomery Works would receive two seniority dates. The first, based on plant-wide seniority, governed all benefits, all layoffs, and job movements within the production grades, and the second, a tester date, governed eligibility for promotions and downgrades within the tester universe. The tester date would be based on length of service in the tester universe except that the plant-wide seniority date would apply once the employee either passed the five training modules or had completed five years experience as a tester. J.A. 52, ¶ B; R.68B-1, Ex. 16.

In short, the Tester Concept nullified certain existing plant-wide seniority rights and adopted a departmental seniority system

[3]The five modules in the tester training program were: (I) Advanced Electronics; (II) Linear Integrated Circuits; (III) Digital Devices & Microcomputers; (IV) Basic Programming, and (V) Data Communications. J.A. 57-58.

[4]Petitioner Lorance became a 38 grade tester and petitioner King a 37 grade tester prior to completing the module training program. J.A. 22-23, ¶¶ 19(a)-(b); R.68C at 157-60; R.68B-1, Ex. 1; R.68C-1, Ex. 1.

[5]If the modules had not yet been completed successfully, promotions to grade 37 and above would be conditioned upon their successful completion. J.A. 53, ¶ I.

for testers that, on its face, was narrowly tailored to the objective of assuring that higher grade testers have the skills or experience that these technically complex jobs require.

By its terms, this modification to the collective bargaining agreement would not be effective unless it was approved by a vote of the Union's membership, 75% of whom were women. J.A. 55; R.68B at 117. The Union called several meetings to discuss the concept during the first six months of 1979, and the concept was heatedly debated. Cert. App. 16a. A June 28, 1979 meeting was called to vote on the change, and several female employees, including at least one petitioner who was not then a tester,[6] lobbied female co-workers to attend the meeting and vote against the Tester Concept. Cert. App. 5a; R.68A at 46-47; R.68C at 90, 98. There was an unusually large turnout of 150 members (about 10%) at the union meeting; the new tester agreement was approved by a hand vote of about 90-60, which, according to petitioners, approximated the proportion of men to women at the meeting. Cert. App. 5a. Each petitioner attended the meeting and voted against the tester program. *Id.*

Petitioners' sole claim is that the 1979 "changeover" to a departmental system was adopted with a discriminatory intent. This claim rests on statements that a few male employees allegedly made at the three union meetings in 1979. Pet. Br., pp. 9-10 & n.3; J.A. 14, ¶ 6(b); R.68B at 84, 91, 103; R.68C at 99-100. Petitioners cannot recall which employees made those statements and are unable to remember innumerable other significant details involving the events in 1979. R.68B at 86, 91, 103; R.68C at 47, 72, 75, 82, 100. As one petitioner testified, "[t]he longer I seemed to think about it, the more things kind of blurred together. It was so long ago." R.68C at 70.

[6]Petitioner Lorance had become a tester on October 30, 1978. Petitioners King and Bueschen became testers on February 25, 1980 and on November 30, 1980, which was after the 1979 agreement took effect. J.A. 22-24, ¶¶ 19(a)-(c).

In addition, no facts are alleged that would suggest that the statements allegedly made by unnamed employees represented the views of the union leadership. See R.68A at 186-87; R.68B at 91, 103, 193; R.68C at 100. Nor is it alleged that AT&T knew what had been said at the union meetings, much less that anyone from AT&T who negotiated the Tester Concept then acted other than for legitimate business reasons. See R.68B at 111-13, 192-93.

3. **The Conceded Immediate Effects Of The 1979 "Changeover".** The agreement containing the Tester Concept became effective on August 1, 1979.[7] As petitioners' complaint asserts, the 1979 changeover to a departmental seniority system immediately affected female testers and non-testers alike, in three separate ways.[8]

First, it meant that female testers (like petitioner Lorance) who had greater plant-wide seniority than male testers lost the ability to exercise this seniority for promotions and other job movements as testers. Consequently, they would inevitably be promoted less quickly within the Tester Universe than they would have been under the prior plant-wide system (and, correlatively, would be more susceptible to downgrades if there was a lack of work). J.A. 21-25, ¶¶ 18-20. Indeed, it was the immediate effect of the new seniority system on promotions that was the subject of the "heated" debates at the 1979 union meetings,[9] and petitioners, in fact, alleged that the 1979 modification of their seniority rights meant

[7]On July 23, 1979, AT&T and the Union executed the agreement to implement the new Tester Concept, effective August 1, 1979. In August, 1980, the 1979 tester agreement was incorporated into a new comprehensive collective bargaining agreement that was negotiated that year. J.A. 55-56; Cert. App. 17a.

[8]As one petitioner testified, "anything that concerns a contractual change at Western Electric [now known as AT&T] between Local Union 1942 and Western Electric affects anyone that works at that plant". R.68C at 214. Consequently, "[t]he tester's concept affects every woman that works at Western Electric." *Id.* at 213.

[9]At the meetings, some male testers allegedly complained that "women were coming in [to tester positions] with [greater plant-wide] seniority and passing the men up [for promotions] and they were tired of it." R.68B at 103; see *id.* at 84; R.68C at 99-100.

they were promoted less quickly[10] (and denied some promotions altogether). J.A. 22-24, ¶¶ 19, 20.

Second, as petitioners alleged, the changeover to the departmental seniority system effectively compelled testers to enroll in the tester "module" training program.[11] Completion of the five modules would immediately restore a tester's plant-wide seniority, and could lead to promotion to higher job grades. J.A. 51, ¶ A(3); R.68B-1, Ex. 16.

Third, petitioners alleged that the 1979 changeover immediately injured female employees who were not yet testers (like petitioners King and Bueschen). Petitioners claim it "discourag[ed] women from entering the traditionally-male tester jobs" because they had "lost their right to carry their plant seniority into tester positions." J.A. 21-22, 25, ¶¶ 18, 20.

In 1979, petitioners believed that the nullification of their plant-wide seniority rights and concomitant adoption of the tester seniority system constituted unlawful sex discrimination. As one petitioner testified, "[a]lready by this time [in 1979] I had made the decision in my mind that what was going on was illegal and that I was going to continue my schooling, get my job and stick to my guns and let a court decide what was right or wrong." R.68C at 146 (petitioner King); see R.68B at 118 (petitioner Lorance). That was why petitioners had opposed the tester concept throughout the first six months of 1979. Yet none filed charges when the system was adopted. The District Court found that each petitioner made a conscious decision to forego filing claims and that each had "sat on [her] rights." Cert. App. 26a-27a.

[10]Petitioner Lorance worked her way up from a 35 grade tester in 1978 to a 38 grade tester. J.A. 22, ¶ 19(a). Petitioner King was not a tester in 1979, but became a 35 grade tester in 1980 and worked her way up to a 37 grade tester. J.A. 23, ¶ 19(b).

[11]Each of the three petitioners enrolled in the training modules because "this is what [they] had to do to get [their] time back," and two of them eventually successfully completed all five modules (although not before their 1982 downgrades). R.68A at 20; R.68B at 12, 74; R.68C at 39, 154-56.

4. **This Suit.** In August and November, 1982, there was an undisputed lack of work at Montgomery Works, and each petitioner was downgraded during a plant-wide reduction in force.[12] Petitioners filed EEOC charges on April 13, 1983 and April 21, 1983 challenging the lawfulness of the departmental seniority system. Cert. App. 18a. This occurred nearly four years after AT&T and the Union instituted the Tester Concept, and after numerous employment benefits had been allocated under it. EEOC conducted an investigation, found no reasonable cause to believe that the charges were true, and issued right-to-sue letters. See EEOC Br., pp. 3-4.

Petitioners filed their complaint in the United States District Court for the Northern District of Illinois on September 20, 1983. Petitioners' amended complaint was filed as a class action on behalf of all female employees at Montgomery Works who "are or were employed as testers, whose seniority rights have been impaired," and females who are not testers but "who have been or will be deterred from seeking promotion to tester positions" because they "have been deprived of their right to carry their plant seniority into tester positions." J.A. 13, ¶ 6. The complaint alleges that the 1979 "change-over from plant seniority to 'tester' seniority" constituted illegal "manipulation of the seniority system" because it "was motivated by an intent to discriminate against women." J.A. 14, 16, ¶¶ 6(b), (f); R.31 at 3; see Cert. App. 43a.

Petitioners' complaint thus prayed that the four-year old departmental seniority system for testers be nullified and the earlier plant-wide system be reinstated. Specifically, it prayed that the

[12]Petitioner King was downgraded from a tester Grade 37 to a Grade 36 position on August 23, 1982 (J.A. 23, ¶ 19(b)); petitioner Lorance was downgraded from a Grade 38 position to a Grade 37 position on November 15, 1982, but promoted back to another (allegedly less preferred) Grade 38 position in November, 1983. J.A. 22, ¶ 19(a). Petitioner Bueschen was downgraded from a tester Grade 35 to a non-tester position in November, 1982, was upgraded to a tester Grade 36 position in September, 1983, but was downgraded to a non-tester position in January, 1984. J.A. 24, ¶ 19(c).

tester seniority system be "declared unlawful and enjoined," that AT&T and the Union be required "to revert to the use of plant seniority for purposes of promotion and down-grading of testers," and that the Court make whole all women adversely affected by the use of tester seniority. J.A. 15, 26-27, ¶¶ 6(e), B, D.

Following initial discovery, AT&T moved for summary judgment on the ground that petitioners' claims were barred by the statute of limitations because the "unlawful employment practice" that petitioners alleged was the 1979 "changeover" from the plant-wide to the departmental seniority system, and their EEOC charges had concededly been filed more than 180 (or 300) days after AT&T and the Union had adopted the new system.

In their summary judgment opposition (and in each subsequent filing), petitioners conceded that their claim depended solely on the alleged illegality of the "adoption" of the 1979 agreement,[13] and that the departmental seniority system was neutral on its face and had been applied in strict compliance with its terms, irrespective of sex. See Cert. App. 9a; R.68B at 147, 185-87; R.68C at 137, 149, 186-87. However, petitioners claimed that (1) they were not "fully aware" of the facts that gave rise to this Title VII claim prior to their downgrades (R.31 at 18-21) and (2) in any event, the lawfulness of a facially neutral seniority system can be challenged on the ground that it was adopted with discriminatory intent each and every time that the system is applied to allocate job benefits. R.31 at 4-18.

The District Court rejected both claims. First, it found that petitioners' testimony established that each was aware of her Title VII claims when the tester system was adopted in 1979 and on

[13]As petitioners stated in their Opposition to Summary Judgment, "their contention [is] that the company and the union intentionally discriminated against women *when* they replaced the system of plant seniority with a seniority system based on tester seniority" in 1979 and that "the *adoption* of the [departmental] system [was] purposefully discriminatory (and hence unlawful)." R.31 at 2 (emphasis added) & 7 (emphasis in original). That this is their sole claim was reiterated in Appellants' Brief in the Court of Appeals (pp. 3-4), the Petition for Certiorari (p. 31), and Petitioners' Brief in this Court (pp. 14-15).

subsequent dates and that petitioners had "sat on their [Title VII] rights." Cert. App. 26a-27a, 32a; see *id.* at 47a-49a. Second, the District Court rejected petitioners' claim that the adoption of a neutral seniority system can be challenged whenever a downgrade occurs. The court concluded that "[t]he resulting denials of promotion and downgradings" were merely "present effects of the past discriminatory act of recalculating seniority credit" and that petitioners' claims were barred by the statute of limitations because EEOC charges were not filed within 180 days of the date when their seniority rights were recalculated, under any view of when that date occurred. Cert. App. 26a, 32a.

The District Court did not accept AT&T's contention (and the Magistrate's conclusion, Cert. App. 43a-44a, 49a) that the statute of limitations ran from the date that the employees knew or reasonably should have known that the plant-wide system had been abrogated and the departmental system adopted. The District Court stated that the statute of limitations could not run until an employee actually entered the tester job classification and thereby became "subject to" the seniority system. Cert. App. 31a-32a & n.6. In the case of two of the petitioners, this did not occur until 1980. *Id.* Because those dates, too, were several years before EEOC charges were filed, the District Court dismissed each of the petitioners' claims. Cert. App. 33a.

The United States Court of Appeals for the Seventh Circuit affirmed. It emphasized that this case involved a facially neutral seniority system that had been nondiscriminatorily applied, and the court rejected petitioners' contention that each application of such a system can constitute a separate act of discrimination. Cert. App. 8a-9a. It reasoned that, otherwise, employees could challenge the legality of a seniority system "indefinitely" and possibly require the "drastic restructuring" of a neutral system after it had operated for years, or even decades. Cert. App. 8a.

This holding required dismissal of the case because once petitioners' extreme contention was rejected, this case was untimely under any standard. Like the District Court, however, the Court of Appeals focused on the time that petitioners actually entered

the tester job classification, stating "that the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially-neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory." Cert. App. 9a.

SUMMARY OF ARGUMENT

Petitioners challenge a departmental seniority system that is neutral on its face and that concededly was nondiscriminatorily administered and maintained during the 180-day limitations period. The sole basis for petitioners' claim is their allegation that this system was illegally "adopted" because AT&T and the Union allegedly acted with a discriminatory motive when they nullified certain plant-wide seniority rights, and adopted the departmental system, four years before EEOC charges were filed. Under petitioners' theory, moreover, the same challenge to these 1979 events could be filed anytime the system is "applied," even if it is decades after those occurrences. This is the litigation of stale claims that Title VII's 180-day statute of limitations is designed to bar. In this case the problem is compounded by the fact that the substance of the inquiry—discriminatory motive—rests on evidence that fades and deteriorates rapidly.

First, it is well settled that when, as here, the conduct alleged within the limitations period is "lawful on the face of things," a plaintiff cannot "convert" this "otherwise legal conduct" into "something illegal" by litigating conduct or events occurring more than 180 days before charges were filed. *Machinists Local* v. *NLRB*, 362 U.S. 411, 419 (1960); *accord, Delaware State College* v. *Ricks*, 449 U.S. 250 (1980); *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977). This epitomizes the prosecution of stale claims that the statute of limitations bars, and that is precisely what petitioners are attempting to do here.

Petitioners and EEOC rely on cases that are simply inapposite. In each, the plaintiffs alleged facts within the limitations period that themselves constituted a violation of Title VII, so there was no staleness problem. *E.g., Bazemore* v. *Friday*, 478 U.S. 385

(1986); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-81 (1982). These decisions simply stand for the proposition that violations occurring within the limitations period are actionable and that it is no defense that the same violations also were committed outside the limitations period. In contrast, when, as here, the conduct within the limitations period is, on its face, lawful, the statute of limitations bars a claim that the conduct is illegal because it "continues" or "gives effect" to an unlawful employment practice that occurred outside the limitations period.

These principles have special force in a case challenging an agreement modifying seniority rights. As the Court has held, seniority rights are the "most valuable capital asset" an employee "owns" (*Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 283 (1986)), and an agreement modifying vested seniority rights produces a loss that is immediately actionable. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982). Conversely, as the facts of this case demonstrate, if EEOC and petitioners were correct that facially neutral and lawfully administered systems can be invalidated on the ground that they were adopted with a discriminatory motive years or decades earlier, it would destroy the "legitimate expectations" of innocent workers, subvert employers' interests, and inhibit collective bargaining, contrary to the purposes of Section 703(h) of Title VII and the most fundamental objectives of our labor laws.

Finally, there is no substance to petitioners' contention that the Court has held, on seven separate occasions, that the operation of neutral seniority systems can be challenged on the ground they were illegally adopted years or decades earlier. There was no statute of limitations issue raised in five of the decisions petitioners cite, presumably because each was timely under respondents' position and the Court of Appeal's holding. The other two decisions foreclose petitioners' claim. *American Tobacco Co.* v. *Patterson, supra; United Airlines, Inc.* v. *Evans, supra.*

ARGUMENT

Introduction

The 180-day[14] statute of limitations of Section 706(e) of the Civil Rights Act of 1964 represents a congressional "judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh [any] federal interest in guaranteeing a remedy." *Mohasco Corp.* v. *Silver,* 447 U.S. 807, 820 (1980); *accord Delaware State College* v. *Ricks,* 449 U.S. 250, 259-60 (1980). Under this principle, the limitations period must be keyed to the wrong that the plaintiff alleges. As this Court has stated, "[d]etermining the timeliness of [an] EEOC complaint, and [an] ensuing lawsuit," thus requires a court to examine the petitioners' complaint and "to identify precisely the 'unlawful employment practice' of which [they] complain." *Ricks,* 449 U.S. at 257.

In this case, petitioners have complained of only one such "practice": the 1979 "changeover" from a plant-wide seniority system to a departmental seniority system for testers, which they allege "was motivated by an intent to discriminate against women." See pp. 9-10 & n.13, *supra.*

Petitioners do *not* allege that the operation of the departmental seniority system was itself unlawful during the limitations period. To the contrary, it is clear from the complaint that petitioners would have no claim at all if the tester seniority system had always existed at Montgomery Works, rather than having been adopted to replace an earlier plant-wide seniority system in 1979.

First, the tester system is conceded to be facially lawful. Departmental seniority systems are commonplace in industry;[15] they

[14]In this case, it is irrelevant whether petitioners' claims are governed by the generally applicable 180-day statute of limitations or by the 300-day limitations period that applies when charges were first pursued in a state or local equal employment agency. See Cert. App. 6a n.2. For simplicity sake, this Brief will refer to the generally applicable 180-day period.

[15]R. Smith, L. Merrifield & D. Rothschild, *Collective Bargaining and Labor Arbitration* 445 (1970) ("In larger establishments, where opera-

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are sought by employers when jobs require special skills or training,[16] and the Court has approved departmental systems in the past, irrespective of their effects.[17]

Here, moreover, the 1979 agreement, on its face, represents what employers and unions are supposed to do in collective bargaining. The agreement is a classic accommodation of employer and employee interests. The tester seniority system, on its face, is narrowly tailored to achieve the employer's interest in assuring that technically proficient employees fill jobs requiring sophisticated knowledge of data processing and communications, and the agreement further contains provisions that will, on their face, open up these jobs to employees in lower grades (who are overwhelmingly women).[18] See pp. 4-6, *supra*. These are the kinds of

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tions are more varied, it is common to establish separate seniority lists on departmental lines or occupational groupings."); *accord.* J. Lapp, *How to Handle Problems of Seniority* 115 (1946). The Bureau of National Affairs ("BNA") has determined that departmental seniority systems are established in 66% of its representative sample of collective bargaining agreements that contain seniority provisions and that in several industries, 100% of the contracts contain departmental seniority systems. See Appendix to this Brief.

[16]As economists and others recognize, employers generally "prefer[ ] the smallest possible seniority districts" (G. Bloom & H. Northrup, *Economics of Labor Relationships* 187 (1977)) and seek departmental seniority systems for skilled and highly specialized employees "for the very obvious reason that a skilled tradesman or specialist cannot be replaced by an unskilled or semi-skilled worker." J. Lapp, *How To Handle Problems of Seniority* 43 (1946); *accord;* F. Harbison, *Seniority Policies and Procedures as Developed Through Collective Bargaining* 23 (1941); *Union Contract Clauses* (CCH) ¶ 51, p. 428 (1954); Note, *Seniority Rights in Labor Relations,* 47 Yale L. J. 73, 85 (1937).

[17]*Teamsters* v. *United States,* 431 U.S. 324, 355-56 & n.41 (1977); *see also, California Brewers Ass'n* v. *Bryant,* 444 U.S. 598, 608 (1980); *Aeronautical Industrial District Lodge* v. *Campbell,* 337 U.S. 521, 526-27 (1949).

[18]Unlike other departmental seniority systems, the length of service as a tester governs only those persons who have not passed certain concededly job-related courses of instruction or acquired equivalent ex-

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provisions that can be adopted by unions and employers for good reasons and that Section 703(h) would then protect from liability, even if the seniority system had adverse effects on women and minorities in its actual operation.[19]

Second, petitioners have conceded that the departmental system was not discriminatorily maintained and administered during the limitations period. See p. 10, *supra.* Men and women testers alike have been promoted to higher grade tester positions, or demoted to lower grades, in strict accordance with the terms of the facially neutral system that was adopted in 1979. *Id.*[20] Petitioners concededly were downgraded in 1982 because they were the "low [persons] on the totem pole" under neutral seniority

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perience. All testers (male and female alike) may "bridge" their plant-wide seniority by successfully completing the five training modules, and the completion of these courses makes the tester eligible for promotions to higher grade positions where there is, by definition, greater job security. Further, all testers "bridge" their plant-wide seniority by completing five years' experience as a tester. In addition, the 1979 tester agreement included educational benefits that make it more likely that the lower grade employees would become testers. See pp. 4-6, *supra.*

It is for these reasons that it is doubtful that the 1979 Tester Concept would, over time, have a disproportionate adverse impact on women. All women with prior plant experience (upon completion of the five training modules) would have greater tester seniority than men with more experience as testers, but less overall service in the plant.

[19]In Section 703(h) of Title VII, Congress made it explicit it did not intend to permit the routine and nondiscriminatory application of a neutral seniority system to be invalidated merely because it perpetuates past racial or sexual imbalances in the workforce or has other adverse effects on women or minorities. See 42 U.S.C. § 2000e-2(h); *Pullman-Standard* v. *Swint,* 456 U.S. 273, 277 (1982); *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 82 (1977); *Teamsters* v. *United States,* 431 U.S. 324, 353-54 (1977).

[20]For example, the women who became testers in the early to mid 1970's or who passed the five modules enjoy their full plant-wide seniority, were promoted ahead of male testers with greater tester experience, and were protected from downgrades. Conversely, when particular women were passed over for promotions, or downgraded, it was because of their tester seniority dates under a neutral system, not their sex.

lists, not because of their sex. As Congress has made explicit, and as the Court has repeatedly held, that is not a violation of Title VII. See p. 16 n.19, *supra* & p. 31, n.34, *infra.*

Accordingly, in challenging the 1982 downgrades and the continued operation of the departmental seniority system, petitioners have made a single allegation: that the initial "*adoption* of the [departmental] system [was] purposefully discriminatory (and hence unlawful)" because "the company and the union intentionally discriminated against women when they replaced the system of plant seniority with a seniority system based on tester seniority" in 1979. R. 31 at 2 & 7 (emphasis in original). In short, petitioners are challenging the 1979 abrogation of the earlier plant-wide system, *not* the subsequent operation of the departmental system as such. Their claim is that their plant-wide seniority rights were discriminatorily nullified in 1979 and that respondents are committing a new violation of Title VII each time job benefits are allocated under a departmental seniority system, rather than a plant-wide system. Yet contrary to the teaching of *Ricks,* they seek to measure their limitations period by events other than those on which their claim rests.

This is squarely barred by the 180-day statute of limitations. Part I of this Brief demonstrates that Section 706(e) bars *any* claim that depends on the litigation of an event outside the 180-day limitations period.[21] See pp. 18-29, *infra.* Part II of this Brief shows that this principle applies with special force to a challenge to the modification of contractual rights under a seniority system. The rule proposed by petitioners and EEOC would destroy expectations of innocent employees and subvert the collective bargaining process itself, contrary to the purposes of Section 703(h) of the Act. See pp. 30-44, *infra.*

There is only one rule that is consistent with the Act: a facially neutral and lawfully administered seniority system cannot be

[21]Contrary to petitioners' (Br., pp. 43-44) and EEOC's (Br., pp. 7, 17-22) contentions, respondents are not claiming that Section 703(h) has somehow modified the statute of limitations contained in Section 706(e) of the Act. Rather, respondents rely upon the same statute of limitation principles that apply to all claims under Title VII.

challenged on the sole ground that it was illegally adopted unless that challenge is brought within 180 days of the date of adoption.

I. Petitioners Are Seeking To Engage In The Very Litigation Of Stale Claims That The 180-Day Statute Of Limitations Is Designed To Prevent, Contrary To Three Decades Of Decisions Of This Court.

Petitioners make the extreme claim that the operation of a neutral and otherwise lawful seniority system can be challenged each and every time it is "applied" to allocate job benefits by alleging that the system was illegally adopted with a discriminatory motive years or decades earlier. That extreme position is necessary to their case. But it is not, and cannot be, the law. If it were, the Union's and AT&T's motive in 1979 could be litigated indefinitely, be it in 1982, 1988, or 2088. This epitomizes the litigation of stale claims that Congress sought to prevent. This is especially so because, as petitioners' testimony demonstrates, evidence of motive peculiarly depends on recollections that quickly become dim or confused and that involve witnesses who may be impossible to identify, much less find. See p. 6, *supra.* Accordingly, the Court has made it explicit that such claims are barred by the statute of limitations.

A. Petitioners' Continuing Violation Theory Was Rejected By This Court's Decisions In *Machinists, Ricks,* And *Evans.*

The seminal statute of limitations decision on this issue is *Machinists Local* v. *NLRB,* 362 U.S. 411 (1960). It arose under the statute that provided the model for the 180-day limitations period of Title VII: the National Labor Relations Act (NLRA).[22] The

[22]The Court has frequently recognized that the NLRA provides the model for Title VII. See, *e.g., Ford Motor Co.* v. *EEOC,* 458 U.S. 219, 226 n.8 (1982). Here, moreover, the section-by-section analysis of the 1972 amendments to Title VII provide that Section 706(e) "would permit charges to be filed [under] a limitation period similar to that contained in the Labor-Management Relations Act, as amended (29 U.S.C. 160(b))." S. Rep. No. 92-415, 36-37 (1971); see also H.R. Rep. No.

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issue in *Machinists* was whether the Board could challenge the enforcement of a union security clause on the ground that it had been illegally adopted outside the six-month limitations period (because the union allegedly lacked the support of a majority of the employees at the time of adoption). *Id.* at 414. The Board made the same claim that petitioners raise here: although the adoption of the clause could no longer be challenged as such, the enforcement had occurred within the limitations period, and the enforcement of an illegally adopted clause is a "continuing violation" that gives effect to the earlier illegal adoption and can always be challenged. *Id.* at 415.

However, the Court held that the statute of limitations barred this claim because it would produce the very litigation of stale claims that the statute of limitations was designed to prevent. *Id.* at 419, 425. The Court recognized that there would have been no staleness problem if the provision of the collective bargaining agreement had been unlawful on its face or if it had been alleged that the agreement's terms had been unlawfully administered within the limitations period. In either event, the conduct within the limitations period could be found unlawful without reference to any other events. *Id.* at 423.[23] However, no such allegations

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92-238, 65-66 (1971) (Minority Report). This six-month period applies to both unfair labor practice charges under the National Labor Relations Act ("NLRA") and to employees' "hybrid" suits for breach of collective bargaining agreements under § 301 of the Labor Management Relations Act ("LMRA"). See *Del Costello* v. *Teamsters,* 462 U.S. 151 (1983).

Thus, courts have held that the six-month statute of limitations in the NLRA and the 180-day limitations period in Title VII were designed to serve the same purposes; "Congress selected an abbreviated limitations period for both statutes to facilitate the twin goals of preventing stale claims and encouraging prompt resolution of employment disputes." *Hill* v. *Georgia Power Co.,* 786 F.2d 1071, 1076 n.9 (11th Cir. 1986).

[23]The Court stated that the statute of limitations does not bar the evidentiary use of events outside the limitations period as "background evidence" in a case "where occurrences within the six-month limitations

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were made in *Machinists*. The "collective bargaining agreement and its enforcement [were] both perfectly lawful on the face of things" and the only way that this "otherwise legal" conduct could be "convert[ed]" into "something illegal" was by litigating events outside the limitations period: *i.e.*, whether the union enjoyed majority support at the time the contract was executed. *Id.* at 419. The Court held that this would constitute the very litigation of stale events that Congress sought to prohibit, would "withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground" they were illegally adopted, and would also do grave "disservice to stability of bargaining relationships." *Id.* at 419, 425.

In so holding, the Court specifically rejected the "continuing violation" theory that is the basis for petitioners' current claims. It reasoned that the "enforcement" of the agreement could be characterized as a "continuing violation" only by litigating the events surrounding its original adoption, contrary to the statute of limitations:

> "The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. . . . [T]he complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. *To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted.* Put another way, if the § 10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement."

Machinists, 362 U.S. at 416-17 (emphasis added).

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period *in and of themselves* may constitute, as a substantive matter, unfair labor practices." 362 U.S. at 416-17 (emphasis added). *Accord, United Airlines* v. *Evans*, 431 U.S. 553, 558 (1977). However, the Court sharply distinguished cases in which, as here, "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier" unlawful employment practice:

> "There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. *Rather, it serves to cloak with illegality that which was otherwise lawful.* And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice."

Id. at 423, 424 (emphasis added). Thus, petitioners miss the point by repeatedly asserting that AT&T's seniority system is intentionally discriminatory and that the issue is whether petitioners can challenge the application of an "illegal" seniority system. See *e.g.*, Pet. Br., pp. 21, 31, 65, 67. As *Machinists* holds, the Court cannot reach the issue of whether the system is illegal because the events necessary to establish its alleged illegality lie wholly outside the limitations period.

Petitioners' tortured attempts to distinguish *Machinists* (Pet. Br., pp. 64-67) overlook that the Court rejected such "hypertechnical distinctions bearing no relationship to the [statutory] purpose" of achieving "repose" for stale events. 362 U.S. at 425. It held that the statute of limitations bars a claim whenever the events within the limitations period are lawful "in and of themselves," and the Court made it explicit that this rule applies to the very kinds of challenges to the operation of seniority systems that are at issue in this case.[24] Accordingly, decisions under the

[24]The Court relied upon, and endorsed, the Board's earlier holding that the six-month statute of limitations bars a claim that a seniority system was discriminatorily manipulated to dilute the claimant's seniority years earlier, notwithstanding the fact that there, as here, charges were filed within six months of a layoff. See *Machinists*, 362 U.S. at 419-20 & n.12, *citing Bowen Products Corp.*, 113 N.L.R.B. 731 (1955). The employee's charge was held to be time-barred because there, as here, the seniority rules were lawful on their face and his layoff fully complied with the applicable seniority rules. 113 N.L.R.B. at 732-33. The Board reasoned that a holding that permitted a challenge to seniority rules
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NLRA and Section 301 of the LMRA alike uniformly hold that the statute of limitations bars a challenge to an adverse employment action such as a job downgrade or layoff, when, as here, it results from a seniority system that is facially lawful and that was lawfully administered within the limitations period.[25]

This Court's decisions under Title VII adopt the same rationale that was the basis for *Machinists*: a claim is time-barred unless

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adopted outside the limitations period would render the six-month statute of limitations "meaningless:"

> "For under this theory, 10, 20, or more years after the original discrimination, the complainant, upon being otherwise properly denied a promotion, transfer, recall, vacation benefits, or other rights based on seniority, could maintain an action therefor by establishing the original discrimination and relating the subsequent action to it."

Id. at 732.

[25]See *e.g.*, *Bailey* v. *Chesapeake & Ohio Railway Co.*, 852 F.2d 185 (6th Cir. 1988) (challenge to legality of seniority-based severance pay agreement was time-barred because action was not filed within 180 days of execution of agreement); *Clift* v. *International Union (UAW)*, 818 F.2d 623 (7th Cir. 1987) (challenge to legality of agreement providing for a national seniority list was time-barred because action was not filed within 180 days of execution of agreement); *Benson* v. *General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983) (challenge to denial of preferential seniority rights begins to run when plaintiffs first became aware, or should have become aware, of diminished seniority rights, not when layoff based on seniority occurred); *NLRB* v. *Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir. 1978) (challenge to application of superseniority clause to union steward was time-barred because charge was not filed within 180 days of date that union and company first granted steward superseniority); *Engelhardt* v. *Consolidated Rail Corp.*, 594 F. Supp. 1157 (N.D.N.Y. 1984), *aff'd*, 756 F.2d 1368 (2d Cir. 1985) (claim challenging plaintiffs' placement on merged seniority rosters was time-barred because claim was not filed within 180 days after execution of merger agreements or adoption of merged seniority lists thereunder); *Grimes* v. *Louisville and Nashville Railway Co.*, 583 F. Supp. 642 (S.D. Ind. 1984), *aff'd mem.*, 767 F.2d 925 (7th Cir. 1985) (challenge to furlough is time-barred because claim was not filed within 180 days of date of prior reinstatement from discharge without seniority credit); see generally *Bowen Products Corp.*, 113 N.L.R.B. 731 (1955).

the occurrences alleged within the limitations period, in and of themselves, constitute a substantive violation of Title VII.

Delaware State College v. *Ricks*, 449 U.S. 250 (1980), is one such case. This case involved a university professor who was told that he had been denied tenure and, as a result, was subsequently terminated the next year after a one year terminal contract had expired. *Id.* at 253 & n.2. His EEOC charges were timely with respect to his termination of employment, but not with respect to the denial of tenure. *Id.* at 253-54, 257 & n.13. The Court ordered the dismissal of the suit. The Court reasoned that, although a challenge to plaintiff's termination was timely filed, the termination of his employment standing alone was neutral conduct, and no allegation had been made that it was discriminatory. *Id.* at 257.[26] The only conduct that was alleged to be discriminatory, in contrast, was the denial of tenure, and that had occurred outside the limitations period. *Id.* at 258.

As in *Machinists*, the Court held that the plaintiff could not rely on occurrences outside the limitations period (the allegedly discriminatory denial of tenure) to challenge conduct within the liability period that was otherwise lawful (the discharge). *Ricks*, 449 U.S. at 258. This was so despite the fact that the discharge was the "inevitable consequence" of the denial of tenure. *Id.* at 257-58.[27] The statute of limitations runs from the "time of the *discriminatory acts*, not . . . the time at which the *consequences* of

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[26]The Court reasoned:

> "In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a 1-year 'terminal' contract, with explicit notice that his employment would end upon its expiration."

Ricks, 449 U.S. at 258.

[27]Contrary to EEOC's revisionist reading (EEOC Br., pp. 16-17 & n.20), the basis for *Ricks* was not that the plaintiff really was challenging
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the acts bec[o]me most painful." *Id.* at 258 (emphasis in original). See also *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). Here, the discriminatory act that is alleged is the 1979 abrogation of petitioners' plant-wide seniority rights; the 1982 downgrades (and other adverse effects that have been alleged) were simply consequences of the dilution of petitioners' seniority that occurred in 1979.

United Airlines, Inc. v. *Evans*, 431 U.S. 553 (1977), applied these same principles in a Title VII case challenging the operation of a seniority system. Contrary to petitioners' statement (Pet. Br., p. 40), the plaintiff's contention in *Evans* was that "United's seniority system illegally discriminate[d] against her" by refusing to credit her with her prior service before she was discriminatorily discharged (and stripped of her accumulated seniority). 431 U.S. at 557. The Court rejected this claim because there, as here, the plaintiff had alleged no facts that called into question the lawfulness of the seniority system during the limitations period.[28]

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his discharge and that it was the inevitable result of the earlier denial of tenure. *Ricks* rested on the ground that the discriminatory employment practice that was charged was the denial of tenure (not the subsequent termination). *Ricks*, 449 U.S. at 257-58. The statute of limitations would have barred the challenge to this act even if the plaintiff in *Ricks* had not subsequently been terminated, but had been allowed to continue to work as an untenured faculty member indefinitely.

Thus, courts of appeals uniformly hold that a refusal to promote an employee must be challenged within 180 days of that decision, even when the employee is not discharged and continues to work for the employer. *Hill* v. *AT&T Technologies, Inc.*, 731 F.2d 175, 179-80 (4th Cir. 1984); *Woodward* v. *Lehman*, 717 F.2d 909, 915 (4th Cir. 1983); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982); *Reed* v. *Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980); *Stewart* v. *CPC International, Inc.*, 679 F.2d 117, 121 (7th Cir. 1982); *Jewett* v. *International Telephone and Telegraph Corp.*, 653 F.2d 89, 93 (3d Cir. 1981); *McKenzie* v. *Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982).

[28]As the Court stated:

> "[Plaintiff] has not alleged that the system discriminates against former female employees or that it treats former employees who were

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At the same time, the Court recognized that the seniority system did give "present effect to a past act of discrimination" and was, in this sense, a "continuing violation." *Id.* at 558. However, it held that "mere continuity" is insufficient to establish a "present violation." *Id.* The Court concluded that "United was entitled to treat that past act as lawful" because it had occurred outside the limitations period and had not been the subject of a timely EEOC charge. *Id.* The Court reasoned that an act outside the limitations period is "the legal equivalent of a discriminatory act which occurred before [Title VII] was passed" and cannot afford a basis for challenging the present operation of an otherwise lawful seniority system. *Id.*

Like *Machinists* and *Ricks, Evans* is controlling here. The plaintiff in *Evans* could not avoid the statute of limitations by claiming that it was a "continuing violation" for United to refuse (during the limitations period) to credit her with the prior service she would have had if she had not been "discriminatorily" discharged. For the same reason, petitioners are barred from claiming that it was a "continuing violation" for AT&T to have refused to recognize the greater seniority rights that petitioners would have had during the limitations period if the plant-wide seniority system had not been "discriminatorily" abrogated in 1979. Each is a *consequence* of acts outside the limitations period, and neither claim could be established without litigating stale events.

B. *Bazemore* And Other Statute of Limitations Decisions Upon Which Petitioners And EEOC Rely Are Irrelevant To This Case.

Petitioners and EEOC defend their position by relying on a series of statute of limitations decisions that are wholly inapposite. In each, there was no staleness problem, and no stat-

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> discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation." *Evans*, 431 U.S. at 558.

ute of limitations bar, because the conduct alleged within the liability period was itself unlawful. The plaintiffs were not seeking to convert neutral and otherwise lawful conduct into a Title VII violation by relying on earlier unlawful conduct outside the limitations period. These decisions simply stand for the proposition that conduct that constitutes a violation of Title VII is actionable if it occurs within the limitations period and that it is no defense that the defendant also committed the same violations during an earlier period.

That was the Court's holding in *Bazemore* v. *Friday*, 478 U.S. 385 (1986). There, blacks were paid less than similarly situated whites for performing the same work within the limitations period. *Id.* at 394. Although the practice had begun many years earlier, there was no staleness problem because "[e]ach week's paycheck" constituted a new violation, and the conduct within the liability period was the violation. *Id.* at 395. It was thus irrelevant that the defendant had also engaged in this race discrimination in the past. *Id.* at 395-96 & n.6. Here, in contrast, the downgrades that occurred within the liability period were on their face perfectly lawful and could only be challenged by litigating stale events.

Petitioners' (Br., pp. 61-63) and EEOC's (Br., p. 12) reliance on *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-81 (1982), and other like decisions, is misplaced for the same reason. There, as in *Bazemore*, the plaintiff alleged and proved an instance of unlawful racial steering that occurred within the limitations period, and there was no possible staleness problem. *Id.* at 368, 370. As in *Bazemore*, the Court held that, although the plaintiff could also have sued earlier, the statute of limitations cannot bar a challenge to conduct within the liability period that itself violates the law. *Id.* at 380-81; accord, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968).

With the exception of two Age Discrimination In Employment Act (ADEA) cases that apparently embrace petitioners' and

EEOC's proposed rule,[29] this unchallenged principle is the basis for each other court of appeals decision that petitioners cite.[30] The two ADEA decisions, moreover, are contrary to *Machinists*, *Ricks* and *Evans*; they conflict with the lower courts' uniform holdings both under the NLRA and § 301 of the LMRA (see p. 22 n.25, *supra*), and they conflict with lower courts' holdings under Title VII that the operation of a neutral and otherwise lawful seniority system cannot be challenged on the basis of events outside the limitations period.[31]

For these reasons, there is no basis for petitioners (Br., pp. 58-59) and EEOC (Br., p. 11 n.13) to rely on those qualified statements of approval of the "continuing violation" doctrine contained in the legislative history of the 1972 amendments to Title VII. See 118 Cong. Rec. 7167 (1972). Respondents agree that the statute of limitations runs from the last occurrence of a violation, rather than from its first. The point is that, in this case,

[29]See *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635 (2d Cir. 1985); *Morelock* v. *NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978).

[30]*Johnson* v. *General Electric*, 840 F.2d 132 (1st Cir. 1988); *Stoller* v. *Marsh*, 682 F.2d 971, 978-79 (D.C. Cir. 1982); *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211, 219 (3d Cir. 1983); *Taylor* v. *Home Insurance Co.*, 777 F.2d 849, 856 (4th Cir. 1985); *Abrams* v. *Baylor College of Medicine*, 805 F.2d 528, 534 (5th Cir. 1986); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743-44 (8th Cir. 1980); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 924-25 (9th Cir. 1982); *Furr* v. *AT&T Technologies, Inc.*, 824 F.2d 1537, 1543 (10th Cir. 1987); *Sevako* v. *Anchor Motor Freight, Inc.*, 792 F.2d 570 (6th Cir. 1986); *Lewis* v. *Local Union No. 100*, 750 F.2d 1368 (7th Cir. 1984); *Patterson* v. *American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980) (finding no statute of limitations bar in challenge to seniority system only because the Court held that adverse effects within the liability period constitute a Title VII violation), *rev'd*, 456 U.S. 63 (1982).

[31]See, *e.g.*, *Nuss* v. *Pan American World Airways, Inc.*, 634 F.2d 1234 (9th Cir. 1980); *Fowler* v. *Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Martin* v. *Georgia-Pacific Corporation*, 568 F.2d 58 (8th Cir. 1977); *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977); *De Graffenreid* v. *General Motors Assembly Division*, 558 F.2d 480 (8th Cir. 1977); *Zangrillo* v. *Fashion Institute of Technology*, 601 F.Supp. 1346 (S.D.N.Y), *aff'd mem.*, 788 F.2d 2 (2d Cir. 1985).

the conduct occurring within the limitations period could not, standing alone, be a violation. The only alleged wrong occurred in 1979, and to prevail, petitioners must prove an unlawful employment practice in 1979. That is barred by the statute of limitations.

C. On A Challenge To The Adoption Of A Seniority System, The Statute Of Limitations Runs From The Time Of Adoption.

Machinists, *Ricks*, and *Evans* foreclose petitioners' and EEOC's extreme claim that the operation of a facially neutral and lawfully maintained seniority system can be challenged anytime it is applied—by alleging that it was illegally adopted for discriminatory reasons years or decades earlier. This Court need decide no more to dispose of this case. Once this extreme contention is rejected, each petitioner's claim is time-barred, whether the 180 days began to run when the system was adopted (as respondents contend) or when each petitioner entered the tester job classification (as the dictum in the lower courts' opinions provide).

However, it is important to emphasize that the reasoning of this Court's prior decisions establish that the pertinent date here is the adoption of a seniority system and that a holding that petitioners' claims ran from this date does not foreclose any employee from filing a timely challenge to the operation of an intentionally discriminatory system.

That petitioners' claims ran from the date of the adoption of the seniority system follows from the fact that this is the *only* unlawful employment practice that they allege. If the Seventh Circuit were correct that persons who became testers in 1983 could challenge the operation of the departmental system by claiming illegal adoption, it would create the very litigation of stale claims that the statute of limitations is designed to bar. They would be transforming a perfectly lawful system into "something illegal" by litigating the stale claim involving the parties' motives in 1979.

Thus, the Seventh Circuit's dictum cannot be reconciled with this Court's decisions. The rule of *Machinists* barred *any* employee from filing charges challenging the lawfulness of the union security clause more than six months after the clause was adopted, even if the employee had been recently hired and filed charges within six months of the time that he or she first became "subject to" the clause. This is not at all anomalous because, in *Machinists* and as in this case, the *ongoing* operation of the clause is perfectly lawful. Indeed, the 1979 agreement epitomizes the seniority systems that a union and an employer could adopt any time for good reasons, and the operation of such a system is valid, whether or not it has adverse effects on women or blacks. See pp. 15-16 & n.19, *supra*. An employee who was hired by AT&T in 1983 would not be denied a remedy for a legal wrong, because the nondiscriminatory operation of such a gender-neutral seniority system is lawful. See p. 31 n.34, *infra*.

At the same time, the statute of limitations could never foreclose any employee (new or old) from obtaining relief from the operation of an intentionally discriminatory system in violation of Title VII rights. For example, if this had been a case in which it was alleged that the seniority system had been unlawful on its face or that it had been maintained and applied with a discriminatory intent during the limitations period, a challenge to the operation of the system unquestionably would have been timely. See, *e.g.*, *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 70 (1982) (an "application" of a seniority system "is infirm" if "accompanied by a discriminatory purpose" during the limitations period). See pp. 41-42, *infra*.

In all such cases, the limitations period will run from the last occurrence that gives rise to the claim, subject to ordinary tolling principles.[32] In contrast, petitioners' claims are time-barred because they did not, and could not, allege such *present* intentional discrimination.

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[32]There is no basis for petitioners and EEOC to invoke the Court's concerns that Title VII's "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." See, *e.g.*, EEOC Br., p. 23, quoting *Delaware State College* v. *Ricks*, 449 U.S. at 262 n.16.
(Footnote continued on next page)

II. The Principles That Bar Stale Claims Apply With Special Force To Challenges To The "Initial Adoption" Of A Seniority System.

Part I of this Brief established that conduct within the 180-day limitations period that is lawful on its face cannot be transformed into a violation of the law by litigating stale or remote events, whether the conduct is the discharge of a teacher, the enforcement of a union security clause, or the administration of a seniority system. This principle requires dismissal of this case. However, petitioners and EEOC also appear to contend that Congress intended that challenges to the operation of seniority systems under Title VII should be an exception both to this principle, and to the policy of repose and stability of bargaining relationships that it represents. Petitioners claim that the Court has so held "on seven occasions" in cases under Section 703(h). Pet. Br., pp. 32-44. There is no substance to these arguments.

The generally applicable statute of limitation principles apply with special force to challenges to facially lawful seniority systems. Seniority systems have a special status under Title VII because Congress recognized that these systems create "legitimate expectations" in innocent workers that should not lightly be disturbed and because the negotiation, or modification, of these systems through collective bargaining is critical to the national

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There no doubt will be cases in which the facts that are the basis for a cause of action are not publicized, or in which there are other legitimate grounds for delaying the commencement of the limitations period. However, the way to address these concerns is to toll the limitations periods during those periods under established principles. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). As *Ricks* itself held, the answer is not to eliminate that statute of limitations altogether, and allow stale claims to be litigated in perpetuity.

This is acutely so here, moreover, because petitioners urged that the statute of limitations should be tolled, but the District Court found, based on their own testimony, that they knew that the 1979 adoption of the tester system had an immediate adverse impact on them, but nevertheless "sat on their rights." Cert. App. 26a. Petitioners have not challenged this finding of fact—and they cannot.

policy of promoting industrial peace. Nothing would be more destructive of these overriding national objectives than a rule in which each "application" of a facially neutral seniority system that has been lawfully maintained and administered for years, or decades, may be challenged by showing that its "initial adoption" was tainted by a discriminatory motive.[33] And the Court's decisions under Section 703(h) foreclose any such rule.

A. The Rule Proposed By Petitioners And EEOC Would Destroy Reasonable Expectations Created By Seniority Systems And Otherwise Impair Collective Bargaining, Contrary To The Purposes Of Section 703(h).

1. In Title VII, Congress "afforded special treatment" to seniority systems. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977). Congress made it explicit that it did not intend to "destroy or water down the vested seniority rights of employees" under neutral seniority systems (*Teamsters* v. *United States*, 431 U.S. 324, 352-53 (1977)), and that the routine and nondiscriminatory applications of a seniority system cannot be a violation of the Civil Rights Act, regardless of whether they have an adverse effect on women or minorities.[34] Section 703(h) was added to Title

[33]No such problems arise when challenges are filed to seniority systems that are facially unlawful. As explained above, these challenges do not present staleness problems, and no *legitimate* reliance interests could be acquired under a system that, on its face, provides that blacks or women have less seniority than whites or men. For similar reasons, allegations that a seniority system was discriminatorily administered (*e.g.*, that women with more tester seniority were downgraded ahead of men) do not threaten vital national policies when they are pursued in a timely fashion; the relief in such cases is to remedy the particular discrimination, not to dismantle the entire system.

[34]As the legislative history made explicit before the inclusion of Section 703(h) in Title VII, "[i]t is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race," but is merely being affected by the nondiscriminatory application of seniority rules. 110 Cong. Rec. 7207 (1964) (Justice Department Memorandum); accord, *id.* at 7217; see *Teamsters* v. *United States*, 431 U.S. at 350-52, 353 n.38; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 760 n.16 (1976).

VII to codify this intent,[35] and this Court has strictly enforced this standard of liability.[36]

Congress gave seniority systems this special status because it recognized that seniority rights are critical to the national objective of achieving industrial peace. "The collective bargaining process 'lies at the core of our national labor policy' " (*American Tobacco Co.* v. *Patterson,* 456 U.S. 63, 76-77 (1982)), and "seniority provisions are universally included in these contracts" (*Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 79 (1977)) because "secur[ing] the prized right of seniority in case of layoff and promotion" is a principal employee purpose for "entering into collective bargaining."[37]

As the Court has repeatedly held, "the rights and expectations surrounding seniority rights make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." *Wygant* v. *Jackson Board of Education,* 476 U.S. 267, 283 (1986) (plurality opinion). Seniority's function "is to determine who gets or who keeps an available job." *Humphrey* v. *Moore,* 375 U.S. 335, 346-47 (1964). "[S]eniority affects the economic security of the individual employ-

[35]It provides that "for an employer to *apply* different . . . terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system" is not unlawful "provided that *such differences* are not the result of an intention to discriminate." 42 U.S.C. 2000e-2(h) (emphasis added). An "application [of a seniority system] is not infirm under Section 703(h) unless it [the application] is *accompanied* by a discriminatory purpose." *American Tobacco Co.* v. *Patterson,* 456 U.S. 63, 70 (1982) (emphasis added).

[36]*Teamsters* v. *United States,* 431 U.S. at 353 (rejecting EEOC's argument that a seniority system is not "bona fide" and loses § 703(h) protection if it perpetuates the effects of past race or sex discrimination in hiring or otherwise has adverse effects on women or minorities); *Pullman-Standard* v. *Swint,* 456 U.S. 273, 288-89 (1982) (rejecting EEOC's argument that an "intent to discriminate" can be inferred from discriminatory effects within liability period alone).

[37]F. Elkouri & E. Elkouri, *How Arbitration Works* 590 (4th ed. 1985). See *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 766-68 & n.28 (1976).

ee" more "than any other provision of the collective bargaining agreement" (*Firefighters Local* v. *Stotts,* 467 U.S. 561, 570 n.4 (1984)) (citations omitted)) because seniority "is a right" which determines present benefits and "which a worker exercises in each job movement in the future." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 768 n.28 (1975). See also *California Brewers Ass'n* v. *Bryant,* 444 U.S. 598, 614 (1980) (Marshall, J., dissenting on other grounds).

2. Against this background, there is no substance to petitioners' and EEOC's claims that respondents' position would require employees to bring "premature claims" before they are "harmed." Pet. Br., pp. 48-53; EEOC Br., pp. 23-24. Seniority is a contractual and property right that inevitably determines future job benefits in a myriad of ways, and is a worker's most important capital asset. As this Court's holdings establish, anything that modifies or dilutes vested seniority rights has an immediate impact on an employee.

Petitioners' complaint proves this point. The 1979 agreement to modify the preexisting plant-wide seniority rights was subject to "heated debate" before the Union approved it precisely because petitioners and others recognized that the agreement would dilute their existing rights and would inevitably affect them adversely. Whereas it was not certain in 1979 that petitioners would subsequently be downgraded in 1982 (EEOC Br., p. 17)[38], the 1979 "change-over" to a departmental system depleted petitioners' seniority, and petitioners' complaint demonstrates it

[38]Contrary to EEOC's claim (Br., p. 17), certainty of adverse impact is not the standard under Title VII's statute of limitations. In *Delaware State College* v. *Ricks, supra,* the Court held that the statute of limitations began to run from the date in which *Ricks* was informed that he had been denied tenure, notwithstanding that a grievance challenging that decision was then pending and that it was not then certain that the denial of tenure (or Rick's ultimate discharge) would occur. See 449 U.S. at 261. The point was that the charge of discrimination was based solely on the June, 1974 decision denying tenure (and occurrences that led up to it) and that it was the event that would cause any future adverse consequences. See also *Chardon* v. *Fernandez,* 454 U.S. 6, 8 (1981).

was certain that they would consequently be passed over for promotions; that they would be susceptible to downgrades in the event of future lack of work (which indisputably occurred in 1982)[39]; and that they would be virtually compelled to enroll in training courses. See pp. 7-8, *supra.* Petitioners' complaint alleged that these adverse consequences began in 1979, and the same complaint and same prayer for relief could have been filed in 1979.

Thus, the terms of Title VII[40], and this Court's decisions make it explicit that a contractual modification of a seniority system is immediately actionable, whether or not the system has been "applied" to deny the employee any employment benefit. *American Tobacco Co.* v. *Patterson,* 456 U.S. 63 (1982), was such a case. It involved a change in a seniority system that, like the 1979 modification at issue here, would have inevitably made it more difficult for plaintiffs to be promoted to better paying jobs, and the affected employees filed charges with EEOC before any promotions were denied (and apparently within days of the adoption of the new system). See *id.* at 66. Both the Opinion for the Court and the dissenting opinion of Justice Brennan made it explicit that the case was not premature and that the adoption of a new seniority system is immediately actionable under Title VII, whether or not the system had been "applied" to deny any plaintiff a promotion.

[39]Here, the 1982 downgrades that precipitated EEOC charges were minor (see p. 9 n.12, *supra*), and the cumulative economic effects of the fact that petitioners were promoted less quickly over the preceding four years could well have been far greater than any consequences attributable to the downgrades.

[40]Section 703(a)(2) allows employees to bring an action as soon as an employer has "classi[fied] his employees . . . in any way which would . . . *tend to deprive* any individual of employment opportunities or *otherwise adversely affect* his status as an employee" by reason of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added). Under these provisions, a plaintiff may challenge the initial adoption of a modified seniority system before it has been applied by alleging that the employer and the union acted with "an intention to discriminate because of race [or] sex" and that the system is thus invalid under Section 703(h).

See *id.* at 69-70 (Opinion for the Court)[41] & 84-85, 86 n.12 (Brennan, J., dissenting on other grounds).[42]

For the same reasons, decisions under Section 301 of the LMRA and the NLRA have uniformly held that a loss of seniority not only may be challenged within six months after it occurs, but also that the statute of limitations bars a future challenge to a layoff or downgrade that results solely from the earlier modification of seniority rights. See p. 21 n.24 & p. 22 n.25, *supra*.

3. It would violate the most fundamental national labor policies to adopt a different rule under Title VII and to permit plaintiffs

[41]In arguing that *American Tobacco* adopted the opposite position, EEOC (Br., p. 21) relies on the Court's statement that "[t]he adoption of a seniority system which has not been applied would not give rise to a cause of action." *American Tobacco Co.*, 456 U.S. at 69. However, EEOC has quoted this statement out of context, and when the statement is viewed in the context in which it was made, it establishes that the initial adoption of a seniority system is immediately actionable.

In the language EEOC now quotes, the Court was rejecting the position that EEOC had urged in *American Tobacco.* EEOC there proposed a "distinction between application and adoption" of a seniority system in which the *adoption* of a system could be challenged by showing it had a discriminatory effect on women or blacks under the discriminatory impact test of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), but in which the subsequent *application* of the system could only be challenged by showing a discriminatory intent (*e.g.*, intentionally discriminatory administration). What the Court said was that this distinction "on its face makes little sense [because] [t]he adoption of a seniority system which has not been applied would not give rise to a cause of action" under *Griggs;* a discriminatory impact obviously cannot be shown until a system is applied. 456 U.S. at 69.

Because the Court held that the adoption of a seniority system can *only* be challenged on the ground that the actual motive was discriminatory, it could scarcely be clearer that the Court recognized that the adoption of a seniority system for discriminatory reasons *does* give rise to a immediate cause of action.

[42]"[There is an] *immediate* impact resulting from the adoption of a particular seniority system in a collective bargaining agreement: The employees in the bargaining unit are bound by the agreement." *American Tobacco Co.*, 456 U.S. at 84-85 (Brennan, J., dissenting) (emphasis in original).

to challenge the operation of a neutral and nondiscriminatorily administered seniority system by alleging that its initial adoption was tainted by discriminatory motives years or decades earlier. That would destroy the "legitimate expectations" that neutral seniority systems create and would profoundly inhibit and burden the collective bargaining process through which seniority systems are created and modified, contrary to the clear intent of Congress in Section 703(h).

For example, here the 1979 tester agreement operated for nearly four years before any challenge was made to its legality, and under petitioners' theory, it could have equally been challenged after it operated for four decades. During that time, petitioners' co-workers changed their positions in reliance on the tester seniority system. Many were promoted to higher grade tester positions between 1979 and 1983. And others enrolled in, and passed, the five separate courses of instruction so that the employees' plant-wide seniority would govern future job movements within the tester universe. See p. 15 n.18, *supra*. If petitioners could now invalidate this neutral and otherwise lawful system on the ground that it was illegally adopted, the "legitimate expectations" of these employees would be destroyed. That would occur, moreover, *despite* the fact that the system had operated as a neutral, rational, *bona fide* seniority system throughout the limitations period.[43]

The interference with substantial reliance interests would not be limited to employees. Here, AT&T agreed to provide (at its expense) educational benefits to its tester and non-tester employees in exchange for the departmental seniority system. The invalidation of the departmental seniority system would mean that AT&T would have been retroactively deprived of the *quid pro quo* for the substantial educational benefits that it has conferred on

[43]It is no answer to argue, as EEOC does (Br., p. 25), that a district court has equitable discretion in fashioning remedies. Adjustment in seniority rights that violate employee reliance interest would be inevitable if it could be established that the 1979 changeover from a plant-wide seniority system to a departmental system was illegal.

its tester and non-tester employees since the 1979 agreement. Indeed, the net effect of the rule that petitioners urge would be that the employees (like petitioners) would have reaped the benefits of the tester agreement but would be retroactively relieved of its burdens.

But petitioners' and EEOC's rule would have far more severe effects on the collective bargaining process itself: it would severely deter employers and unions from agreeing to any change in a seniority system as part of collective bargaining agreement, no matter how beneficial the agreement, as a whole, would be to the employees in the bargaining unit generally.

For example, agreements like the 1979 tester agreement could arise when a union approaches an employer to explore ways to open up the choicest "tester" jobs to employees in the lower grades and an employer agrees to do so by offering special educational programs if seniority rights can also be modified to assure that senior supervisory tester positions would be filled by persons with sufficient skill and experience. This is precisely the kind of solution that collective bargaining is intended to achieve. Yet that process would be profoundly inhibited if the modification of seniority rights could be challenged five, ten, or twenty years later by dredging up statements that (unidentifiable) employees made at a union meeting—as petitioners have here. The burden of litigating such stale claims and the threat of backpay and other disruptions would severely inhibit any efforts to change seniority rights as part of larger, beneficial arrangements, notwithstanding that this is integral to collective bargaining.

The Court has repeatedly held that Section 703(h), and the provisions of Title VII as a whole, must be construed to avoid such interference with national labor policy.[44] *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982), is especially pertinent. There, the issue was whether an employee could challenge the initial

[44]*Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239-40 (1982) (refusing to require offer of retroactive seniority to toll backpay liability because of frustration of innocent co-workers' expectations); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81-83 (1977) (refusing to require exceptions to seniority system to accommodate religious requirements).

adoption of a seniority system by showing that it would have a disproportionate impact and requiring the employer and union to show a valid business purpose under the rule of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Justices Brennan, Blackmun, and Marshall would have permitted such claims but *only if* the challenge to the system's adoption was filed within the 180-day limitations period; otherwise, they emphasized that plaintiffs could challenge neutral seniority systems indefinitely and upset the "legitimate expectations" of co-workers. *American Tobacco Co.*, 456 U.S. at 81, 86 (Brennan, J., dissenting).[45]

The Opinion for the Court went even further in assuring that challenges to the adoption of a seniority system could not disrupt the fundamental goals of the Act. While indicating that challenges to the system's adoption must be brought within 180 days (*see* pp. 39-40, *infra*), the Court held that requiring that the adoption of a seniority provision be justified under *Griggs* would unduly burden and inhibit collective bargaining and "discourage unions and employers from modifying . . . seniority systems," contrary to the purpose of Section 703(h). 456 U.S. at 70-71. Because Congress intended that the subsequent application of a seniority system cannot be challenged unless "[the application] is accompanied by proof of a discriminatory purpose," the Court held that challenges to the system's adoption, too, required a showing of discriminatory purpose. *Id.* at 69-70.

These principles are controlling here. The only way to assure that modifications of seniority systems are not "discouraged," and "legitimate expectations" of innocent employees are not destroyed, is to enforce Section 706(e) and Section 703(h) in accordance with their terms and the settled principles of *Machinists*, *Ricks*, and *Evans*. Challenges to the "initial adoption" of neutral

[45]Justice Brennan stated that it is only "[a] timely [180-day] challenge to the *adoption* of a seniority plan" that would prevent such "legitimate expectations" from arising because "the notice provided by the filing of charges serves to reduce the likelihood of employees acquiring unjustified expectations concerning seniority rights during any ensuing investigation and litigation of the charges." 456 U.S. at 81 & n.4 (Brennan, J., dissenting) (emphasis in original); see also *id.* at 83 n.8.

and nondiscriminatorily administered seniority systems must be brought within 180 days. Thereafter, routine nondiscriminatory application and maintenance of the system may not be challenged, regardless of its effects.

B. The Court's Section 703(h) Decisions Have Never Adopted The Rule Petitioners Now Propose.

Finally, contrary to petitioners' claim, the Court has never held that a Title VII claimant can challenge a neutral seniority system that lawfully operated during the limitations period by showing that it was adopted with a discriminatory motive years or decades earlier—and that the statute of limitations never runs on such challenges to the initial adoption of a system. Pet. Br., pp. 31-44. As shown below, five of the seven seniority decisions petitioners cite are irrelevant because the statute of limitations was not raised, presumably because (as the facts suggest) there was no conceivable limitations bar. A sixth case—*United Airlines, Inc.* v. *Evans*—forecloses this claim. See pp. 24-25, *supra*. And in the final case—*American Tobacco Co.* v. *Patterson*—the statute of limitations had been raised in the court of appeals, and eight of the nine members of this Court indicated that the statute of limitations bars untimely challenges to the initial adoption of neutral seniority systems.

In *American Tobacco*, the Court of Appeals for the Fourth Circuit had rejected a statute of limitations defense because, under its (erroneous) holding that the adoption of a seniority system could be challenged by showing a disparate impact on blacks within the limitations period, there was no staleness problem. *Patterson* v. *American Tobacco Co.*, 634 F.2d 744, 749 (4th Cir. 1980). Although the statute of limitations issue was not directly raised when this Court reviewed the Fourth Circuit's decision, this Court then recognized the applicability of the 180-day limitations period to a challenge to the adoption of a seniority system in reversing the Fourth Circuit's erroneous interpretation of Section 703(h). The Court stated that, taken together, the interpretation of Section 703(h) in *Teamsters* and the holding in *Evans* that

acts occurring outside the 180-day statute of limitations period are "lawful," effectively immunize any neutral seniority system from challenges that are not timely filed:

> "In *Teamsters* v. *United States, supra,* we held that § 703(h) exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices. Similarly, by holding that '[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed,' *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977), the Court interpreted 703(h) to immunize seniority systems which perpetuate post-Act discrimination. Thus taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that '[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act' discriminatory impact."

American Tobacco Co. v. *Patterson,* 456 U.S. at 75-76 (emphasis in original).[46]

Although Justice Brennan (joined by Justices Marshall and Blackmun) dissented, he stated that Title VII precludes a claimant from challenging the adoption of a *bona fide* seniority system unless a timely charge is filed, and would have remanded for a determination of when the system had been adopted. *Id.* at 86 n.12 (Brennan, J., dissenting); see p. 38 & n.45, *supra.* Thus, eight of the nine members of the Court recognized the applicability of

[46]EEOC argues (Br., p. 18 n.23) that *American Tobacco* could not establish that there is a statute of limitations bar in this case. EEOC contends that the Court's holding applied only to *bona fide* seniority systems, and EEOC claims that AT&T's departmental seniority system would not be *bona fide* if, as petitioners allege, it was adopted with a discriminatory intent in 1979. This is simply incorrect.

Section 703(h) "defin[es] what is and what is not an illegal discriminatory practice." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 761 (1976); *American Tobacco Co.* v. *Patterson,* 456 U.S. 63, 69 *(Footnote continued on next page)*

the limitations bar to a claim that a seniority system was illegally adopted.[47]

Petitioners' remaining citations are wholly inapposite because no limitations issue was raised at any stage of the proceedings. In several of the cases, it is clear from the face of the Court's opinion that challenges were timely under the standard respondents urge. In *Nashville Gas Co.* v. *Satty,* 434 U.S. 136 (1977), there was no possible staleness problem because the system, on its face, was not

(Footnote continued from previous page)
(1982). Even if neutral seniority systems adopted with discriminatory intent were not "bona fide," no Title VII claim can be brought unless the facts showing the lack of bona fides occurred during the limitations period.

Thus, in applying Section 703(h), the question must be whether the conduct that gave rise to the EEOC charge during the liability period *itself* resulted from an intention to discriminate during that same period, and was not merely the nondiscriminatory application of neutral criteria. Congress made it explicit that the latter is not a violation of Title VII. See p. 31 n.34, *supra.* Whatever reasons may have entered into the initial adoption of a seniority system, a neutral system that is maintained and applied free of unlawful discrimination during the limitations period is, under Section 703(h), *not* a violation of Title VII. The initial adoption of the system, like the alleged unlawful conduct in *Machinists, Ricks,* and *Evans,* does not convert subsequent nondiscriminatory maintenance of the system into an independent violation of Title VII.

Further, EEOC is incorrect that a neutral and otherwise lawful seniority system is not *bona fide* if it was adopted with a discriminatory intent. Under the terms of Section 703(h), the bona fides of a seniority system and the intent with which it is adopted, or applied and maintained are separate requirements. The Court has thus held that the operation of a seniority system can be challenged by showing *either* that "the seniority system . . . is not 'bona fide' *or* that the differences in employment conditions . . . are 'the result of an intention to discriminate because of race.' " *California Brewers Assn.* v. *Bryant,* 444 U.S. 598, 610-11 (1980) (emphasis added).

[47]Justice Stevens stated that there should be no time limitations period applicable to claims that neutral seniority systems were illegally adopted after Title VII took effect. See 456 U.S. at 90 n.7 (Stevens, J., dissenting).

gender neutral: the seniority system applied during the limitations period made the sex-based distinction between pregnancy and other disabilities that the Court held to be unlawful. Similarly, to the extent that the seniority system was at issue in *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63 (1977),[48] the challenge was timely because the claim was either that the system was unlawful on its face (because it could operate to force persons either to work on Saturdays against their religion or to face discharge) or that the system had been unlawfully applied during the limitations period to produce that result. Similarly, in *California Brewers Assn.* v. *Bryant,* 444 U.S. 598 (1980), the plaintiffs claimed that the 45-week rule had been discriminatorily applied within the limitations period (*id.* at 601-02 & n.4) and, further, that it was so susceptible of discriminatory application that it was invalid on its face. *Id.* at 602 n.4, 604 n.8.

In the remaining cases, no statute of limitations issue was raised, or was relevant. In *Teamsters* v. *United States,* 431 U.S. 324 (1977), the employer raised no statute of limitations issue because there could never have been a limitations bar under the sole theory that EEOC urged and that the lower courts accepted: that a departmental seniority system is unlawful if it operates to perpetuate the effects of pre-Act discrimination (as the departmental system in that case unquestionably did). See *id.* at 349-50, 353. Conversely, once that theory was rejected, there was no case because the plaintiffs conceded both that the seniority

[48]The issue in *Hardison* was whether it was a Title VII violation for an employer to discharge a person who refused to work on Saturdays because it was against his religion. The seniority system was discussed in the case because it was one of several ways in which the employer could have theoretically accommodated its business interests and its employee's religious interest without forcing him to work on Saturdays. See *Hardison,* 432 U.S. at 77-83. Petitioners' reliance (Br., p. 44) on *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976) is misplaced for the same reason. The challenge in *Franks* was not to a seniority system at all, but to a "racially discriminatory hiring system." 424 U.S. at 758. The Court's discussion of seniority systems pertained solely to the availability of retroactive seniority as a remedy for such violations. *Id.* at 752.

system was *bona fide* and that the differences in employment conditions were not the result of an intent to discriminate on the basis of race. *Id.* at 355-56.[49]

Similarly, no statute of limitations issue was raised in *Pullman-Standard* v. *Swint,* 456 U.S. 273 (1982). Presumably, that is because the claim that was made in that case was that the seniority system had been established, reestablished, administered, and maintained with a discriminatory intent over a 36-year period beginning in 1941 and continuing into the 180-day limitations period—and beyond. See *id.* at 283.

Because the statute of limitations is not jurisdictional (*see Zipes* v. *Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982)), nothing this Court said in *Teamsters* or *Swint* can constitute even an implicit holding on the application of the statute of limitations. But the analysis of each forecloses petitioners' claims. *Teamsters* and *Swint* referred to the fact that a number of factors are relevant in assessing whether a seniority system is lawful under Section 703(h), including whether the system is applied equally to all races and sexes, whether it is rational and in accord with industry practice and NLRB precedents, and whether the system had its "genesis in racial discrimination" and has been "negotiated and maintained free from any illegal purpose."[50] These factors are all germane to assess the current operation of the system within the liability period, and the "genesis" of the system can be "relevant background evidence" when there are allegations of discriminatorily-motivated conduct within the limitations period, as there are not here. See *Machinists,* 362 U.S. at 416; *Evans,* 431 U.S. at 558; p. 19 n.23, *supra.*

[49]Moreover, as this Court has emphasized, the date of adoption of that system at issue in *Teamsters* was unclear (see *American Tobacco, supra,* 456 U.S. at 76 n.16), and if there had been evidence that the system was adopted or maintained for discriminatory reasons, that evidence could well have existed during the limitations period.

[50]*Teamsters,* 431 U.S. at 355-56; *cf. Swint,* 456 U.S. at 279-81 (discussing criteria applied by lower court in assessing the "totality of the circumstances in the development and maintenance of the system").

In contrast, *Machinists, Ricks,* and *Evans* hold that a neutral system that has been lawfully and nondiscriminatorily administered and maintained for years cannot be challenged by alleging that it was initially adopted with an illicit motive. For the reasons explained above, that would violate Section 706(e) and contravene the policies of Section 703(h).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX
STATISTICS OF BUREAU OF NATIONAL AFFAIRS ON DEPARTMENTAL SENIORITY SYSTEMS

Contracts With Departmental Seniority

Industry	Total Contracts	Departmental Seniority	Percentage
All Industries	359	239	66 %
Apparel	9	1	11
Chemicals	16	8	50
Communications	10	4	40
Construction	2	0	0
Electrical Machinery	19	8	42
Fabricated Metals	18	3	17
Foods	21	15	71
Furniture	6	5	83
Insurance & Finance	5	2	40
Leather	4	3	75
Lumber	7	5	71
Machinery	25	19	76
Maritime	4	2	50
Mining	12	5	42
Paper	14	14	100
Petroleum	7	6	85
Primary Metals	25	19	76
Printing	5	4	80
Retail	26	15	57
Rubber	6	3	50
Services	26	22	84
Stone, Clay & Glass	13	11	84
Textiles	10	10	100
Transportation Equipment	34	30	88
Transportation	25	18	72
Utilities	10	7	70

Note: *Caution should be exercised* in the use of a sample analysis of this type because:

(1) All frequency figures apply only to the contract sample studied. To the extent that the sample is broadly representative, those figures approximate general practice.

(2) The presence of certain provisions in some contracts and their absence in others may be due to such different factors as varying industry conditions or merely the special emphasis given by company or union negotiators in the industries concerned.

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REPLY

BRIEF

FOR ARGUMENT

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No. 87-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA A. LORANCE, JANICE M. KING, and CAROL S. BUESCHEN,

Petitioners,

v.

AT&T TECHNOLOGIES, INC., and LOCAL 1942, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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October Term, 1988

PATRICIA A. LORANCE, JANICE M. KING, and CAROL S. BUESCHEN,

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v.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Petitioners submit this brief in reply to respondents' brief. With respect to most of respondents' arguments, we rest on our principal brief and on the brief for the United States and the Equal Employment Opportunity Commission as

amici curiae. Our reply brief addresses only the following five points.

I. CONTRARY TO RESPONDENTS' MISCHARACTERIZATION OF PETITIONERS' ARGUMENT, PETITIONERS CONTEND THAT THE CURRENT OPERATION OF THE "TESTER" SENIORITY SYSTEM IS UNLAWFUL.

The Company and Union consistently mischaracterize the arguments of the female workers. Repeatedly, respondents assert that the "sole" basis for petitioners' claims is that the seniority "system was illegally 'adopted' because AT&T and the Union allegedly acted with a discriminatory motive" when they changed the plant seniority system to the "tester concept." Resp. Br. at 12; see also, id. at 2, 6, 10, and 17.

To the contrary, petitioners rely upon the operation and effect of the discriminatory seniority system The petitioners alleged in their Complaint that AT&T and the IBEW conspired to change

the seniority system "in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs," and that "[t]he purpose and effect of this manipulation of seniority rules" were to advantage male employees over female employees. Joint App. 20-22 (Emphasis added).

In accordance with these allegations, the petitioners have argued that "[w]henever the seniority system operated as intended by AT&T and Local 1942 to deny job opportunities to petitioners because of their gender, AT&T and Local 1942" commit an unlawful employment practice. Brief at 21. (Emphasis added). When the Company and Union implement the conspiracy to discriminate against women, they violate Title VII. Since the petitioners filed charges of discrimination within the

requisite filing period, Brief at 13-16, from the date that the Company and Union implemented the discriminatory seniority system to bump petitioners to lower-paying jobs while males with less seniority remained in the higher-paying jobs,[1] the petitioners have filed timely charges.

The issue in this case is whether the district court, on a motion for summary judgment, improperly dismissed this action on the ground that the plaintiffs' EEOC

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1 When petitioner Lorance was downgraded on November 15, 1982, from job grade tester 38 to job grade tester 37, there were sixty-seven grade 38 testers with less plant seniority than Lorance. When petitioner King was downgraded on August 23, 1982, from a job grade 37 tester to a job grade tester 36, there were thirty-two grade 37 testers with less plant seniority than King. When petitioner Bueschen was downgraded on November 15, 1982, from a job grade 35 tester to a job grade 33 position there were one hundred four job grade 36 testers with less plant seniority than Bueschen. 68A at exhibit 11 (Exhibit 11 to the Deposition of Bueschen, attached as Appendix A).

charges were not timely. In this procedural posture, the Court must accept the petitioners' "version of the facts," including the allegations in the complaint.[2] Bishop v. Wood, 426 U.S. 341, 347 (1976). Accordingly, respondents' repeated references to a "neutral," "nondiscriminatory" seniority system, Brief at 14-17, "adopted ... for good reasons," and protected from liability by § 703(h), id. at 16, see also, id at 31-39, are not pertinent to the issue before the Court.[3]

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2 The petitioners never took discovery in this case because "the Court accepted the parties' recommendation that discovery should be held in abeyance pending resolution of the Company's ... Motion for Summary Judgment." Joint Status Report (Feb. 7, 1986), R. 46.

3 Respondents concede that no legitimate reliance interests are acquired under a seniority system that explicitly provides less seniority for the work of women that it provides for that of men. Resp. Br. at 31 n.33. Yet they cite no authority for their contention that the

II. RESPONDENTS' RELIANCE UPON INAPPROPRIATE AND INACCURATE FACTUAL ARGUMENTS UNDERSCORES THE ERROR IN THEIR POSITION THAT THE PETITIONERS FILED UNTIMELY DISCRIMINATION CHARGES.

Respondents repeatedly and inappropriately (in light of the Court's review of a grant of summary judgment, see, section I, supra) use disputed record

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rule should be different for a system which suffers from the same intention to discriminate but chooses to achieve that goal through the operation of a policy which is designed to disadvantage women without establishing explicit gender classifications. Concern for the "substantial reliance interests" of employees and the lost investment of the company in the "quid pro quo" for the challenged agreement, it is suggested, override the statutory goal of Title VII. Id. at 36. This Court certainly must reject a position which would permit a timely challenge to an intentionally discriminatory policy to be thwarted by the interests of the parties to the unlawful agreement. See e.g., EEOC v. Home Insurance Co., 553 F. Supp. 704, 713 (S.D.N.Y. 1982); Jackson and Matheson, The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits, 67 Geo. L.J. 811, 851 (1979).

facts in support of their arguments.[4] A brief review of the record shows that respondents mischaracterized the evidence and that, properly viewed, the record

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[4] In an effort to support their position, respondents commissioned a private research project from BNA Plus, a "custom research" division of The Bureau of National Affairs, Inc. The project was done pursuant to "specifications" set forth by AT&T Technologies. The respondents attached a summary of this project as an Appendix to their Brief and referred to the facts produced by this project. Brief at 14-15, n.15.

The Court "has consistently ... condemned" the practice by counsel of "attaching to a brief [as have respondents] some additional or different evidence that is not part of the certified record." R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (6th ed. 1986) at 564. "[A]ppellate courts have dealt promptly and severely with such infractions [by, for example] granting a motion to strike the 'offending matter.'" Id. at 564-65.

Petitioners requested respondents to remove the references to the outside-the-record private study; the respondents refused. Appendix B. The petitioners have lodged with the Clerk of the Court the underlying data for the project which the respondents produced with Mr. Carpenter's letter dated March 3, 1989.

underscores the error in respondents' arguments.

1. Respondents state that the petitioners' claim that the 1979 changeover from plant to tester seniority "rests on statements that a few male employees allegedly made at the three union meetings in 1979," that "no facts are alleged" that the statements "represented the views of the union leadership," and that it is not "alleged that AT&T knew what had been said at the union meetings" or that anyone from AT&T negotiated the new seniority system for other than "legitimate business reasons." Resp. Br. at 6-7; see also, Brief at 14-15 (emphasis added).

First, the harsh impact of the new dual seniority system on female workers provides objective circumstantial

evidence of discriminatory intent.[5] By depriving women of the use of seniority accumulated in the "traditionally" female jobs when they moved to the "traditionally" male tester jobs, the 1979 seniority system has an obvious adverse impact on the job opportunities of female workers. See, n.1, supra, and R68B at 59, 147 and 187.

---

[5] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); see also, Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 n. 24 (1979). Such objective evidence includes the fact "that the law [or practice] bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976). In addition, "actions [undertaken which have] foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." Columbus Board of Education v. Penick, 443 U.S. 449, 464 (1979); see also Dayton Board of Education v. Brinkman, 443 U.S. 526, 536 n.9 (1979); Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

Second, union officials admitted that the purpose of the seniority changeover was to "protect" those male workers who were working in the tester positions when female workers began to move into those jobs in the 1970's. Mr. Holly, a union official, R68C at 61, told petitioner King that the Tester Concept was instituted "to protect people ... who were already testers." R68C at 207-08; see, R68C at 71-74. Another union official, Craig Payne, told petitioner Lorance that she "was not really wanted in testing." R68B at 42 (Craig Payne was a Vice President of the Union, R68B at 86).[6]

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6 Company officials and supervisors knew that the incentive to change the seniority system came from the Union's desire to protect the job positions of the male testers and to relieve the "tension" in the plant caused by the male workers' hostility to the advancement of the female workers. R68C at 48-54. In addition, a union official, Steve Lorenz, told petitioner Lorance that a member of "upper management," Skelton, the manager of manufacturing, R68C at exhibit 15d, called the female workers "Suzys;" that "Suzys belonged out making the data sets ... didn't belong in testing and that Suzys were coming in and hurting the men." R68B at 114-16; see also 68A at 44-45.

Furthermore, management's hostility to women moving into the tester positions was illustrated by the fact that women were not afforded the same opportunity to work on new jobs as men, R68B at 28 and 30, and R68C at 43, and that men received more assistance and training from supervisors than women, R68B at 28, 35, and 80.

Third, the conduct of the 1979 Union meetings demonstrates the discriminatory purpose of the seniority change. The first meeting described in the record was attended by approximately twelve men, including the treasurer (Batterson) and vice president (Payne) of the Union, and two women (Lorance and Jones). R68B at 84-89. "The men ... were upset because women were coming in with seniority and ... bypassing them for the upgrades.... They wanted something done

about it." R68B at 84. "Most" of the men present "were complaining about women coming in." R68B at 87.[7]

The Union responded to the complaints from the men by creating the Tester Concept. The Tester Concept was ratified at the June 28, 1979 union meeting. Pet. Brief at 9-10. It was "a very heated" meeting with the men sitting on one side of the room and the women on the other side.[8] R68C at 101. Union members complained, once again, "that women were coming in with seniority

---

7 Petitioner Lorance only learned about this meeting because she overheard some testers talking about the meeting. R68A at 173. Apparently, the men were holding several secret meetings to which no women union members were invited. R68B at 89; see also, R68A at 31-32. These "secret" meetings would be a focus of the plaintiffs' discovery if they are able to pursue their claims.

8 The record is unclear as to how well and fairly the meeting was published. See, R68C at 87-88.

passing the men up and they were tired of it." R68B at 103.[9]

Fourth, the hostility of the male testers to the entry of women into tester positions extended from the union meetings to the shop floor. For example, during the period in 1979 when the seniority change was under consideration, offensive posters were repeatedly placed "all over" the workplace. R68B at 110;[10] R68A at 28-30; R68C at 23-25. Company supervisors and union officials knew

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9 Petitioner Lorance recalled a single woman, whose husband worked as a tester, speaking in favor of the seniority change. She said "she was in favor of [the seniority change] because of her husband [and because the women testers were] taking bread off their table." R68B at 104.

10 In one particularly offensive set of posters women were shown "standing with dresses, like, at their knees, socks like nylons, okay, with money hanging out of them." The posters had the caption "I'm a tester now. I make lots of money. I have lots of seniority." R68B at 109.

about the posters. R68C at 24-27; R68B at 110-14.

2. Respondents assert that "[t]he agreement is a classic accommodation of employer and employee interests," Resp. Br. at 15; that it is "narrowly tailored," id. at 6; that it is "rational," id. at 36; and that it is a "departmental system" like many other systems, id. at 14-15. Respondents may attempt to establish these points if there is a trial on the merits. However, these arguments are irrelevant to this issue presented on summary judgment and, in any event, the present record does not support respondents' conclusions.

For example, respondents have not established that the division of the hourly paid jobs into two seniority units qualifies as a standard departmental seniority system rather than, as

petitioners maintain, an arbitrary division designed to advantage male workers over female workers.[11]

Furthermore, respondents maintain that the Tester Concept "addressed traditional employer concerns" by creating "separate seniority lists for skilled and unskilled workers." Resp. Br. at 4. Respondents rely on several authorities for the proposition that employers generally prefer small, departmental seniority systems separating skilled and unskilled workers. Resp. Br. at 15, n.16. However, respondents fail to acknowledge that these same authorities also conclude that unions usually prefer seniority districts "broad enough in scope to include all employees for whom they are

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[11] Respondents' desperate, improper and incompetent attempt to rely upon outside-the-record facts must be rejected. See, n.4, supra, and Appendix B.

the bargaining representatives." Union Contract Clauses (CCH) ¶ 51,428 (1954)[12] (Emphasis added).

The Union, not the Company, proposed the Tester Concept. R68B at 104-05. Accordingly, when the Union proposed this seniority change, which split its bargaining unit, it advocated a position contrary to the standard and expected union position. This departure by the Union from the general preference of unions to avoid divisiveness among the members of a bargaining unit supports the allegation that this particular decision was motivated by a discriminatory purpose. See, Teamsters v. United States, 431 U.S. at 356.

3. Respondents base their

12 See also, G. Bloom & H. Northrup, Economics of Labor Relations 237 (1981); F. Harbison, The Seniority Principle in Union-Management Relations 33 (1939).

arguments upon the assumption that it was clear when the agreement incorporating the Tester Concept was signed in 1979, Joint App. 50-56, that tester rather than plant seniority would govern job downgrades. Resp. Br. at 5, 7. However, as demonstrated by the Union's own position statement made in January 1983, it was not clear whether tester or plant seniority applied to downgrades until after the petitioners were demoted. Appendix A.

After the petitioners were downgraded in 1982 they requested that the Union file a grievance on their behalf. When Local 1942 filed a grievance beyond the ten-day period established by the contract,[13] the petitioners complained to

13 The Company rejected the grievances filed on behalf of King, Bueschen and Lorance because the grievances were filed more than 10 days after the job downgrade. R68A at exhibit

the International. In an explanation of its actions to the International, Local 1942 stated that there is a disagreement about the interpretation of the Tester Concept between the Union and the Company.

> The Union's contention is that there were three (3) provisions provided for employees on roll entering the testing universe. All of these were for the upward movement.
>
> * * * * *
>
> The Company's position is that they intend to apply the same procedure on the downward trend.

Id. (Emphasis added). Consistent with the Union's contention in 1983, petitioner King had been told by Union officials that

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10. The petitioners maintain that the Union discriminatorily failed to file a timely grievance because the Union "had plenty of notice [to file on time including] a written request from [Lorance] to file a grievance for [the three petitioners]." R68B at 176; see, R68A at 188-89.

tester seniority "would be used for upgrades only" and that plant seniority would be used for downgrades. R68C at 119 and 123.

Moreover, the 1983 Union document indicates that this issue and, implicitly, the Union's contention that tester seniority applied only to upgrades, "had been discussed at the Union meetings and the sister had been advised that the Union was in the process of negotiating the Tester Training Program" and that the union is "in a negotiation stage and attempting to resolve these problems with the Company...." Appendix A. Consistent with this 1983 statement that the Union was still negotiating with the Company, petitioner Bueschen was told in 1981 by the president of the Union that the Union was still negotiating about the Tester

Concept. R68A at 78-79.[14]

Seniority systems and collective bargaining agreements often are ambiguous and subject to conflicting interpretations. The meaning of such agreements is hammered out during their implementation by employers and by the resolution of the disputes that arise from that implementation. To compel workers, as the respondents' position requires, to file charges of discrimination before such agreements are implemented would require the filing of unnecessary litigation about the hypothetical application of unclear collective bargaining agreements and employment practices. Pet. Br. at 48-55; United States Amici Curiae Br. at 23-24.

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[14] The Tester Concept was never approved by the International and never included in the master contract between the Union and the Company. R68C at 214-15; R68B at 122-24.

This case is a good example. From 1979 through 1982 it was unclear whether the new seniority system applied to downgrades. The Union maintained that it did not, and the Company maintained that it did. If the petitioners filed a charge before they were harmed by a downgrade, the district court would have been placed in the position of interpreting the agreement prior to its application by the parties -- assuming that the court would rule that the issue was ripe for decision.

III. RESPONDENTS ASK THE COURT TO ADOPT AN EXTREME POSITION THAT WAS REJECTED BY BOTH COURTS BELOW AND THAT NO COURT HAS ADOPTED.

AT&T and Local 1942 argue that employees may not make a Title VII challenge to an ongoing seniority system "unless that challenge is brought within 180 days of the date of adoption." Resp. Br. at 17-18. This extreme position has

not been adopted by any court and was explicitly rejected by both courts below.

As the district court recognized, the rule advocated by respondents would "encourage[ ] people to bring unripe claims alleging harms that they may never experience," and would "only clog the already overburdened courts with lawsuits that are not ripe." Pet. App. 29a-30a.[15] Such a rule would guarantee needless confrontation rather than the "[c]ooperation and voluntary compliance" sought by Congress "as the preferred

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15 See also Johnson v. General Electric, 840 F.2d 132, 136 (1st Cir. 1988) ("It is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all"); NLRB v. International Bhd. of Elec. Workers, 827 F.2d 530, 534 (9th Cir. 1987); Heiar v. Crawford Cty, 746 F.2d 1190, 1194 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); EEOC v. Westinghouse, 725 F.2d 211, 219 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984).

means for achieving [Title VII's] goal." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). See also Reed v. United Transportation Union, 57 U.S.L.W. 4088, 4090 (Jan. 11, 1989).[16]

The court of appeals rejected respondents' proposed rule for the same reasons: "Requiring employees to contest any seniority system that might some day apply to them would encourage needless litigation," and "would frustrate the remedial policies that are the foundation of Title VII." Pet. App. 8a. Under respondents' approach, the Seventh Circuit noted, "any seniority system would be

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16 An employee's natural desire to seek an informal resolution or to attempt to comply with the policy's requirements (as did petitioner Lorance) would be stymied by a forced march to the courthouse at the outset. See e.g. Heiar v. Crawford Cty, 746 F.2d at 1194 ("People do not want to begin their employment by suing their employer over a" policy that will affect them years later, if at all.)

immune to challenge [180 or] 300 days after its adoption," and "[f]uture employees would therefore have no recourse when confronted with an existing seniority system that they believe to be discriminatory." Id.

The harshness of respondents' position is chilling. This position would largely insulate intentionally discriminatory employment practices[17] from challenge 180 (or 300) days after their adoption even with regard to persons not employed by the company or represented by the union at the time of the adoption of the practice. Accordingly, an employment test used for promotional decisions and neutral on its face but instituted with an intent to discriminate would be immune to

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17 Respondents' position would apply to all discrimination claims brought under Title VII. Resp. Br. at 17 n.21.

challenge by a worker hired one year after the adoption of the test. Even though the newly hired worker was harmed by the test one week after her employment and even though she filed a charge the following day, the respondents' position would require the rejection of the charge as untimely filed.

Not surprisingly, no court has ever embraced the extreme view of Title VII's filing requirement espoused by respondents.

IV. INTERNATIONAL ASSOCIATION OF MACHINISTS v. NLRB DOES NOT SUPPORT RESPONDENTS' POSITION.

Respondents rely heavily on International Association of Machinists v. NLRB, 362 U.S. 411 (1960) ("Bryan Manufacturing"), construing the six-month statute of limitations under § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). See, Resp. Br. at 18-

23. There are two reasons that Bryan Manufacturing does not support respondents' position: even if the NLRA limitations doctrine applied to Title VII, it does not bar the petitioners' claims; in any event, the NLRA limitations doctrine does not apply.

1. For the reasons set forth in our principal brief, Bryan Manufacturing would not bar plaintiffs' claims even if that decision applied in the Title VII context. In general, petitioners have maintained that Bryan Manufacturing precludes untimely challenges to flaws in the establishment of otherwise lawful labor policies but does not preclude an action, such as Lorance, alleging that the challenged policy is itself illegal. Pet. Br. at 64-67.

Petitioners' position is supported by the reliance of the Court in

Bryan Manufacturing on the decision of the National Labor Relations Board in Potlatch Forests, Inc., 87 NLRB 1193 (1949), as an example of the correct interpretation of § 10(b) of the NLRA. 362 U.S. at 419. In Potlatch the Board held that, by "applying and giving effect to a [discriminatory] seniority policy" during the limitations period of §10(b), an employer violated the NLRA regardless of the date on which the policy was adopted. 87 NLRB at 1211.[18] Like AT&T and Local 1942 in the present case, the respondents in Potlatch adopted an illegal policy which did not cause

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[18] The challenge in Potlatch was to a "Return-to-Work Policy" providing "that, in the event of a lay-off resulting from a curtailment of operations, employees who returned to work ... during the course of the 1947 strike were to possess preferential retention rights over [strikers]." 87 NLRB at 1208. As do respondents, the employer argued that "the validity of the ... policy is no longer open to attack, because it was established some 16 months before the filing of the charge." Id. at 1210-11.

employees an injury in the form of layoffs until a reduction in force was required. However, with each layoff under the unlawful policy the company "discriminated" against employees who had engaged in protected union activity and thereby committed a fresh violation of the NLRA. 87 NLRB at 1211.[19]

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[19] In rejecting the employer's statute of limitations defense the Board emphasized that "[t]he issue in this case is not whether the Respondent committed an unfair labor practice by inaugurating the policy, but whether it violated the law by continuing to maintain it; more specifically by applying and giving effect to it in .... lay-offs [which] occurred well within the statutory period limited by Section 10(b)." Id. at 1211 (emphasis added).

Because an independent violation occurred with each application of the unlawful policy, the Bryan Manufacturing Court cited Potlatch as a case where evidence of the discriminatory motive at work in the initiation of the policy was properly "used to illuminate current conduct claimed in itself to be an unfair labor practice." 362 U.S. at 419-20. The fact that, as the Board goes on to say, that "[e]ven without such consideration ... the allegations ... would have been

2. Moreover, recent decisions of this Court strongly suggest that the restrictive limitations doctrine of Bryan Manufacturing is properly confined to the narrow area within the NLRA governing individual challenges to allegedly unfair labor practices in bargained-for agreements.

In DelCostello v. Teamsters, 462 U.S. 151 (1983), the Court described the § 10(b) limitations period as specifically "attuned to ... the proper balance between the national interests in stable bargaining relationships and finality of

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found amply supported by" proof of facts within the limitations period, 87 NLRB at 1211, does not alter this principle. That the challenged policy in Potlatch employed an overt distinction between strikers and non-strikers does not vitiate the principle of the case -- for which it is cited in Bryan Manufacturing -- that the current conduct constituted by the application of a policy "claimed in itself to be" unlawful, 362 U.S. at 420, is actionable regardless of the date of its original adoption.

private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." Id. at 171 (quoting United Parcel Service v. Mithcell, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring)). In refusing to apply § 10(b) to a claimed violation of an employee's free speech as to union matters, this Court in Reed v. United Transportation Union, 57 U.S.L.W. at 4092 concluded both that the federal interest in repose in collectively bargained agreements is not central to the goal of § 101(a)(2) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(2), and that a countervailing federal interest in the protection of free speech informs the LMRDA.

In particular, the Court relied upon

the fundamental individual interests in free speech modeled on the Bill of Rights and protected by the LMRDA. 57 U.S.L.W. at 4090. This different balance of interests, the Court held, precluded the application of the narrow § 10(b) limitation period.

Title VII also does not share the overriding legislative interest in the stability of collective bargaining agreements that led to § 10(b) and to its restrictive statute of limitations doctrine for some claims under the NLRA. Although resolution of disputes is one objective of Title VII, this statute, like the LMRDA, "implements a federal policy ... that simply had no part in the design of a statute of limitations for unfair labor practice charges," Reed, 57 U.S.L.W. at 4092, and that weighs heavily against the application of a restrictive

limitations period.

The Court in Reed emphasized the need for the limitations period to "accommodate the practical difficulties faced by § 101(a)(2) plaintiffs, which include identifying tne injury, deciding in the first place to bring suit against and thereby antagonize union leadership, and finding an attorney." 57 U.S.L.W. at 4090. See also, Owens v. Okure, 57 U.S.L.W. 4065 (Jan. 10, 1989). Identical obstacles face Title VII plaintiffs. See, Pet. Br. at 48-55. Aware of these obstacles in amending Title VII in 1972, Congress explicitly approved decisions having "an inclination to interpret [the § 706(e)] time limitation so as to give the aggrieved person the maximum benefit of the law." Section-by-section analysis of Equal Employment Opportunity Act of 1972, P.L. 92-261, 118 Cong. Rec. 7167

(March 6, 1972).[20]

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20 Respondents rely on the legislative history of the 1972 amendments to Title VII to support the position that section 706(e) should be interpreted in light of the § 10(b) limitations period of the NLRA. Brief at 18 n.22. But that history indicates that Congress merely adopted a limitations period "similar" to that in the labor statute. It in no way supports the contention that Congress meant to incorporate its restrictive limitations doctrine. In fact, it is clear from the same legislative history that Congress intended to endorse the doctrine of continuing violations and decisions interpreting the statute of limitations as running "from the last occurrence of the discrimination and not from the first occurrence ... and other interpretations of the courts maximizing the coverage of the law." Section-by-section analysis, 118 Cong. Rec. 7167 (March 6, 1972).

In addition, respondents support their contention by referring to Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982), which cites only the patterning of Title VII's remedial provision, Section 706(g), on the analogous section of the NLRA. Even in that context, Ford Motor Co. cautions that "[t]he principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII." Id.

There is no support for the proposition that Congress intended to incorporate in Title VII the restrictive

The policy underlying Title VII, of course, seeks the elimination of employment discrimination. "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" Alexander v. Gardner-Denver Company, 415 U.S. 36, 47 (1974), quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). The right to be free of employment discrimination is this Act's equivalent of the free speech protection of the LMRDA. Congress specifically intended to achieve this important national goal through Title VII actions brought by private litigants acting as "private attorneys general."[21]

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limitations doctrine of the NLRA.

[21] Title VII charges and lawsuits "provid[e] the 'spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of their discriminatory

In view of the strong federal interest in eradicating employment discrimination through private actions, the balance of interests underlying § 10(b) of the NLRA as interpreted in Bryan Manufacturing simply does not apply in the context of Title VII.

V. THE COURT'S PRIOR DECISIONS PROVIDE THAT A SENIORITY SYSTEM DESIGNED TO DISCRIMINATE MAY BE TIMELY CHALLENGED BY AN INTENDED VICTIM WHEN SHE IS HARMED BY THE OPERATION OF THE SYSTEM.

Respondents contend that prior Title VII decisions of this Court either are "[i]rrelevant," Resp. Br. at 25, or support respondents' extreme interpretation of §706(e). Id. at 23-25, 39-44. Petitioners submit that, to the contrary, these decisions demonstrate that an employee may challenge an

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practices." Teamsters, 431 U.S. at 364 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

intentionally discriminatory policy whenever that policy is applied to her detriment. See, Pet. Br. at 25-44.

In Bazemore v. Friday, 478 U.S. 385 (1986), the Court declared that each application of a discriminatory pay practice is "a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." Id. at 395-96. The violation in Bazemore was simply that the current application of the pay practice "perpetuated" the discriminatory effects of a practice established before Title VII became effective. Id. at 395. The pay practice was currently applied in a neutral manner and no intentional discrimination, other than the perpetuation of prior discrimination, was established.

Similarly, the fact that the

intentionally discriminatory seniority policy in this case was originally adopted outside the limitations period cannot protect it from challenge at the time it is applied to the detriment of female employees.[22]

Discussing a seniority system adopted outside the statute of limitations, the Court in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), endorsed petitioners' contention that Title VII "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." Id. at 560. Evans' particular claim was barred because she did not allege any illegality in the seniority system. As the Court

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[22] This conclusion is consistent with general civil rights doctrine which permits a challenge to an unconstitutional policy whenever it is given effect. See e.g., Mobile v. Bolden, 446 U.S. 55 (1980); Village of Arlington Heights v. Metropolitan Housing Corp., supra.

explained in Bazemore v. Friday, the result in Evans would have been different had plaintiff alleged that "the seniority system itself was intentionally designed to discriminate." Such a contention--identical to that alleged by petitioners here -- would have properly asserted that defendant was "engaged in discriminatory practices at the time" the suit was brought and would therefore have made out a violation of Title VII. Accordingly, a "present violation exists" by virtue of the current operation of an intentionally discriminatory system regardless of the remoteness of its original adoption. Bazemore, 478 U.S. at 396 n.6.

As described in petitioners' main brief, numerous decisions of the Court support the position that the statute of limitations for challenges to an intentionally discriminatory policy runs

from the date of its most recent application to the detriment of a protected class member. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), for example, the Court assumed that a policy alleged to be the result of intentional discrimination could be challenged as long as it was in operation.

The Court rejected the EEOC's advocacy of a distinction for purposes of § 703(h) coverage between seniority plans adopted before and those systems adopted after the effective date of Title VII. In so concluding, the Court implicitly approved challenges to the application of discriminatory policies adopted outside the 180-day limitations period. 456 U.S. at 70. The Court noted that in Patterson one Title VII challenge (alleging race discrimination) was filed within the statute of limitations period after the

policy's adoption and a second challenge (alleging sex discrimination) was filed beyond that period. 456 U.S. at 70, n. 4. The Court expressed no hesitation as to the timeliness of the latter challenge by employees to whom the challenged policy had applied since its adoption and for a period longer than the limitations period.[23]

Patterson supports the conclusion that a challenge to an intentionally discriminatory seniority policy is timely if filed within the statute of limitations period running from the date of its most recent application.

Respondents' contention that the "facially neutral" nature of the

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23 The Court also indicates that "persons whose employment begins more than 180 days after an employer adopts a seniority system" may, contrary to the extreme position of respondents, see, Section III, supra, file a timely charge. 456 U.S. at 70.

challenged policy is somehow significant is belied by the case law. The relevant inquiry is whether "differences in employment conditions" are "the result of an intention to discriminate because of race, color, religion, sex, or national origin." See e.g. California Brewers Association v. Bryant, 444 U.S. 598, 611 (1980). The Court's Title VII cases do not support the suggestion that a policy deliberately designed to disadvantage women is protected against subsequent challenge if the mechanism chosen does not involve overt distinctions based on gender.

Where an employer and union apportion seniority credits in a manner designed to discriminate against female workers, the fact that they implement the scheme through the "neutral" operation of the seniority system does not vitiate the

discrimination.[24] The fact that the companies and unions attempt to conceal their intentionally discriminatory conduct should not shield them from Title VII liability.[25]

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[24] For example, it would not be permissible for a union and employer to decide that, because a particular division was predominately female, seniority credit for service in that division would be awarded at a rate half that of the rest of the plant. Such a policy, although "facially neutral," clearly constitutes an "unlawful employment practice" under Section 703(a) of Title VII. Although lacking an explicit gender distinction, each operation of this intentionally discriminatory seniority policy would be actionable. See, United States Amici Curiae Br. at 16 n.19.

[25] The respondents compare the application of their proposed standard to "facially lawful" with their standard's application to "facially unlawful" seniority systems. See e.g., Resp. Br. at 31. This comparison is meaningless; no company or union is going to broadcast in collective bargaining agreement its invidious intent by instituting an overtly discriminatory seniority system. See, United States v. Bd. of School Commissioenrs, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978) ("In adage when it is unfashionable for state officials to openly express racial

Respondents' reliance on Delaware State College v. Ricks., 449 U.S. 250 (1980), is also misplaced. Like the plaintiff in Evans, the plaintiff in Ricks challenged a discrete act of alleged discrimination against him -- in his case, the decision of a college board of trustees to deny him tenure. Also like the plaintiff in Evans, the plaintiff in Ricks failed to file his charge of discrimination within the statutory period after this discrete act occurred. He did not allege or prove that he was harmed by the continuing operation of any discriminatory system or policy; rather "the only alleged discrimination occurred -- and the filing limitations periods therefore commenced -- at the time the tenure decision was made and communicated

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hostility, direct evidence of overt bigotry will be impossible to find.")

to Ricks." 449 U.S. at 258; see also, 449 U.S. at 258 n.9.

As demonstrated in our principal brief, the Court in its prior Title VII seniority cases has repeatedly recognized the operation of an illegal seniority system as an unlawful employment practice, without regard to the date on which the system was adopted or the date on which the plaintiff initially became subject to the system. Pet. Br. at 31-44. Nothing in Evans, Ricks, Bazemore, or any other decision of this Court supports a departure from this well established principle.

Conclusion

Petitioners respectfully request that the Court reverse the judgment of the

Seventh Circuit.

Respectfully submitted,

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APPENDIX A - Exhibit 11 to the
Deposition of Petitioner Bueschen,
R.68A, exhibit 11.

International Brotherhood of Electrical Workers

1741 JERICHO ROAD
AURORA, IL 60506

LOCAL 1942

TELEPHONE 859-2833

January 12, 1983

RECEIVED
JAN 13 1983
SIXTH DISTRICT, I.B.E.W.

James P. Conway
Sixth District Vice President
373 Schmale Rd., Suite 201
Carol Stream, Illinois 60187

Dear Sir and Brother:

Re: Three letters of complaint.

In response to your letter dated 12-20-82. In 1978 this Local entered into negotiations with the Montgomery shop. As to what is referred to, it is the Montgomery Works Tester Training Program. This program was originally designed to further train the testers presently on roll as well as to provide a means by which the non-testers on roll could obtain the necessary training to become testers. This was made part of the contract in 1980. (See tabs 1 & 2) It was further agreed during 1980 bargaining that the Company would negotiate and prepare a booklet, (Copy enclosed), to pass out to all testers.

The Union and the Company have spent several hours attempting to negotiate the Tester Training Program. The final meeting was held on 12-21-82 with J.E. McGovern, Bargaining Agent, Western Electric Company, wherein we were unable to agree on tabs 3,4,5,6,&7. At that time the Company was advised by me that grievances would be issued on behalf of all testers involved. (See attached letters for each of the individuals involved).

Fraternally,

James Cappleman

James Cappleman
President & Business Manager
I.B.E.W, Local 1942

JC/ia
Enc.

EXHIBIT
BUESCHEN
11

Sister P.A. Lorance - E#809857

Sister Lorance sent me a letter dated 11-9-82 whereing she gave me five (5) days to respond. Subsequently I was attending a EM3 Council Meeting in Columbus, Ohio and was unable to do so.

This particular issue had been discussed at the Union meetings and the sister had been advised that the Union was in the process of negotiating the Tester Training Program.

The Union's contention is that there were three (3) provisions provided for employees on roll entering the testing universe. All of these were for the upward movement.

1). Employees spend five (5) years in a tester universe before being able to bridge Montgomery service for the upward movement.

2). Obtain the same amount of service as other testers in the universe.

3). Completion of the five (5) modules in the Tester Training Program.

The Company's position is that they intend to apply the same procedure on the downward trend. The specific information on P.A. Lorance is; she has a 4-8-70 Montgomery service date. She entered the testing universe from a 32 grade to a 35 grade on 10-30-78. She has passed four (4) modules as to date. She was downgraded from a 38 grade tester on 11/15/82 to a 37 grade tester.

There are presently sixty-seven (67) 38 grade testers with less Montgomery service.

Grievances were issued on her hehalf, (copies attached), and still at the present time the Company is taking the position that these grievances are untimely. We still contend that since we were in a negotiation stage and attempting to resolve these problems with the Company, that our time frame started 12-21-82.

Sister J.K. King - E#805595

Sister King sent me a letter dated 11-4-82 wherein she gave me five (5) days to respond. Subsequently I was attending a EM3 Council meeting in Columbus, Ohio and was unable to do so.

This particular issue had been discussed at the Union meetings and the sister had been advised that the Union was in the process of negotiating the Tester Training Program.

The Union's contention is that there were three (3) provisions provided for employees on roll entering the testing universe. All of these were for the upward movement.

1). Employees spend five (5) years in a tester universe before being able to bridge Montgomery service for the upward movement.

2). Obtain the same amount of service as other testers in the universe.

3). Completion of the five (5) modules in the Tester Training Program.

The Company's position is that they intend to apply the same procedure on the downward trend. The specific information on J.K. King is; she has a 5-4-71 Montgomery service date. She entered the testing universe from a 32 grade to a 35grade on 2-25-80. She has passed three (3) of the testing modules as to date. She was downgraded from a 37 grade tester to a 36 grade tester on 8/23/82.

There are presently thirty-two (32) 37 grade and sixty-one (61) 35 grade testers with less Montgomery service.

Grievances were issued on her behalf, (copies attached), and still at the present time the Company is taking the position that these grievances are untimely. We still contend since we were in a negotiation stage and attempting to resolve these problems with the Company, that our time frame started 12-21-82.

Sister C.D. Bueschen - E#809256

Sister Bueschen sent me a letter dated 11-4-82 wherein she gave me five (5) days to respond. Subsequently I was attending a EM3 Council Meeting in Columbus, Ohio and was unable to do so.

This particular issue had been discussed at the Union meetings and the sister had been advised that the Union was in the process of negotiating the Tester Training Program.

The Union's contention is that there were three (3) provisions provided for employees on roll entering the testing universe. All of these were for the upward movement.

1). Employees spend five (5) years in a tester universe before being able to bridge Montgomery service for the upward movement.

2). Obtain the same amount of service as other testers in the universe.

3). Completion of the five (5) modules in the Tester Training Program.

The Company's position is that they intend to apply the same procedure on the downward trend. The specific information on C.D. Bueschen is; she has a 2-2-70 Montgomery service date. She entered the testing universe from a 32 grade to a 35 grade on 11-30-80. She has passed one (1) of the testing modules as to date. She was downgraded from a 35 grade tester on 11-15-82 to a 33 grade utility operator.

There are presently one hundred four (104) 36 grade testers with less Montgomery service; thirty-five (35) - 37 grade testers, seventy-nine (79) - 38 grade testers, and one (1) - 39 grade testing layout operator.

Grievances were issued on her behalf, (copies attached), and still at the present time the Company is taking the position that these grievances are untimely. We still contend since we were in a negotiation stage and attempting to resolve these problems with the Company, that our time frame started 12-21-82.

APPENDIX B - Correspondence Regarding the Use by Respondents in their Brief of Outside-the Record Facts and a Privately Commissioned Research Project:

1. Letter from Barry Goldstein, counsel for petitioners, to Susan Korn, senior labor analyst, BNA Plus, March 1, 1989.

2. Letter from Paul Wojcik, general counsel of BNA, to Barry Goldstein, March 1, 1989.

3. Letter from Barry Goldstein to Rex Lee and Stephen Feinberg, counsel for respondents, March 2, 1989.

4. Letter from David Carpenter, counsel for respondents, to Barry Goldstein, March 3, 1989.

5. Letter from Barry Goldstein to David Carpenter, March 3, 1989.

6. Letter from David Carpenter to Barry Goldstein, March 6, 1989.

LDF
NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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Washington, DC 20005 (202) 682-1300 Fax: (202) 682-1312

HAND-DELIVER

March 1, 1989

Ms. Susan Korn
BNA Plus, Room 215
1231 25th Street, N.W.
Washington, D.C. 20037

Dear Ms. Korn:

As I told you yesterday by telephone, I just learned that the Appendix to the Respondents' Brief in Lorance v. AT&T Technologies, No. 87-1428, entitled "Contracts with Departmental Seniority," was prepared by a section of the Bureau of National Affairs called "BNA Plus." There was no reference in the brief, which I have sent to BNA, to the source of the data other than BNA.[1]

By telephone yesterday I requested a copy of the "report," if any, from which this chart was taken. You told me that this was a "customized" job. I requested all the information about the chart; for example, there is no indication as to how the so-called "representative sample," see, Resp. Brief at 15 n.15, was determined, how "departmental" was defined, or even the dates for the contracts. You told me that it was contrary to BNA policy to release the "specifications" for a "customized" job or even the name of the client.

This BNA work-product, assuming that it has not been altered in any way, can not be evaluated without BNA providing the "specifications" for the job, and the supporting information about the sample, the definitions used, etc. Of course, it is important to evaluate not only the validity of BNA's work product, but also whether BNA's work product has been properly

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[1] There is no reference in the Table of Authorities to the BNA report. The only reference in the Brief to the source for the report is "Appendix to this Brief," Resp. Brief at 15 n.15. The Appendix only refers to the "Statistics of Bureau of National Affairs on Departmental Seniority Systems;" there is also a copyright 1989 by The Bureau of National Affairs."

Contributions are deductible for U.S. income tax purposes.

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used by AT&T Technologies and the Union. Obviously, this evaluation can not even be begun without the supporting information, methodology and definitions used to prepare this chart.

The petitioners reply brief is due on March 7. I need the above information immediately in order to determine whether and, if so, in what matter a reply should be made to this BNA work-product.

If a BNA "client" uses, as here, in a Supreme Court Brief a customized product from BNA without revealing that it is such a product or setting forth all of the information necessary for an evaluation of the BNA product, then BNA should reveal all of the necessary information in order to assure that neither the Court is misled nor opposing parties harmed.

I know that it is not BNA who has sought to introduce facts from outside of the Record into the argument before the Supreme Court. But since, as I have been told, BNA "prepared" these facts, BNA has a responsibility for the use or misuse of its product.

As a result of the time requirements for filing a reply brief, I would appreciate an immediate response.

Very truly yours,

Barry Goldstein

Barry Goldstein

BG:oet

THE BUREAU OF NATIONAL AFFAIRS, INC.

Paul N. Wojcik
Vice President, General Counsel,
and Assistant Secretary

Direct Dial: (202) 452-4799

March 1, 1989

Barry Goldstein
NAACP Legal Defense and
Educational Fund, Inc.
Suite 301
1275 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Goldstein:

Your letter to Susan Korn has been referred to me for a reply.

The Bureau of National Affairs, Inc., does not reveal the identity of its subscribers, the products they subscribe to, or the nature of any research done on their behalf. Such information is guarded in order to protect the privacy rights of our customers and the proprietary rights of BNA in its customer lists.

Your inquiries concerning the source and nature of information used in a court brief, and the question of whether such use is proper or improper, would be more properly directed to those filing the brief.

Yours truly,

Paul Wojcik

March 2, 1989

Rex E. Lee, Esquire
c/o David W. Carpenter, Esquire
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Stephen J. Feinberg, Esquire
Asher, Pavalon, Gittler
& Greenfield, Ltd.
Two North LaSalle Street
Chicago, Illinois 60602

Re: Lorance v. AT&T Technologies, Inc.

Dear Mr. Lee and Mr. Feinberg:

By this letter I am requesting that you agree to remove the Appendix and the entire reference to the Appendix, the last sentence in footnote 15 on page 15, from Respondents' brief. The Appendix contains entirely outside-the-record facts prepared, as I understand it, expressly for the Respondents. The facts are unpublished and unavailable. There is no way for the Petitioners to verify or evaluate the "facts" contained in the Appendix. The extra-record material in improper and should be stricken from the Respondents' Brief. R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (Sixth ed. 1986) at 564-65.

As I set forth in the enclosed letter to Ms. Susan Korn, an employee of BNA Plus, I have determined that the material enclosed in the Appendix to Respondents' Brief in Lorance and referred to on page 15, in the last sentence of footnote 15, does not come from a published source. Rather, I have been informed by BNA that it was a "customized" job prepared to certain "specifications" for an unnamed "client."

Other than a general reference to BNA there is no source cited for the data and conclusions submitted to the Court in the Appendix and footnote 15 of the Brief. As stated in the letter to BNA:

> This BNA work-product, assuming that it has not been altered in any way, can not be evaluated without BNA providing the "specifications" for the job, and the supporting information about the sample, the definitions used, etc. Of course, it is

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> important to evaluate not only the validity of BNA's work product, but also whether BNA's work product has been properly used by AT&T Technologies and the Union. Obviously, this evaluation can not even be begun without the supporting information, methodology and definitions used to prepare this chart [in the Appendix]

BNA refused to produce any information or even the name of its client "in order to protect the privacy rights of our customers and the proprietary rights of BNA in its customer lists." Letter from Paul N. Wojcik, General Counsel, BNA, to Barry Goldstein, dated March 1, 1989. (The letter is enclosed). BNA directed the Petitioners' "inquiries concerning the source and nature of information used ... to those filing the brief." Id.

The Supreme Court "has consistently ... condemned" the practice by counsel of "attaching to a brief [as Respondents' counsel have done in Lorance] some additional or different evidence that is not part of the certified record." Supreme Court Practice at 564. As noted in Supreme Court Practice, "appellate courts have dealt promptly and severely with such infractions [by, for example] granting a motion to strike the 'offending matter.'" Id. at 564-65.

The material in the Respondents' Brief is particularly troublesome because there is no reference in the Brief to the fact that the material resulted from a privately commissioned study that is unavailable to the Court, opposing counsel, or the public. Nevertheless, the Respondents refer to their private study as a "representative sample of collective bargaining agreements." Id. at 15 n.15.

Of course, the extra-record facts presented in the Defendants' Brief do not fall under "the so-called Brandeis brief technique in bringing to the Court's attention published material containing facts which bear upon the reasonableness of legislation." Supreme Court Practice, at 565 (Emphasis added). The Respondents seek to introduce before the Supreme Court unpublished material; moreover, the facts are privately developed, irrelevant to the reasonableness of any legislation, and submitted without any foundation or authentication. The presentation of these facts would be inadmissible before the district court since no foundation has been established; to say the least, it is inappropriate that the Respondents have sought to present to the Supreme Court this unpublished, outside-the-record material from some unidentified "sample."

Since the Petitioners' Reply Brief is due on March 7, 1989, the Petitioners must have a reply by 3:00 p.m. on Friday, March 3 as to whether the Respondents will agree to remove the Appendix and footnote 15 from their Brief. If we do not receive such a commitment, then we will have to respond to the Respondents' use of this material in our Reply Brief.

I have had this letter sent by fax to David Carpenter (312-853-7312), Stephen J. Feinberg (312-263-1520), and Charles C. Jackson (312-269-8869) on March 2. A copy was also sent by Federal Express to each of these attorneys for delivery on March 3. I also sent a copy, hand-delivered, to Robert Weinberg on March 2.

Very truly yours,

Barry Goldstein

Barry Goldstein

BG:oet

Enclosure

cc: Robert Weinberg, Esquire
Charles C. Jackson, Esquire
Richard J. Lazarus, Esquire
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March 3, 1989

Barry Goldstein, Esq.
NAACP Legal Defense and
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1275 K Street, N.W.
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Re: Lorance v. AT&T Technologies
No. 87-1428 (U.S. Supreme Court)

Dear Mr. Goldstein:

This is a reply on behalf of both respondents to your letter of yesterday, March 2, 1989. We were surprised to learn both that you decided at this late date to review the BNA materials discussed in our brief (filed January 23, 1989) and that BNA denied you access to them. We have therefore telephoned BNA and consented to the release of any material which cannot be released without our consent. In addition, we are enclosing herewith the materials that BNA would not show you and that it provided us: (1) its statement of research methodology and results, (2) its computer printout of the contracts, and (3) the table analyzing contracts with departmental seniority. We are faxing this material to you today and are separately sending it Federal Express for delivery tomorrow.

We trust that this fully addresses your concerns on what should be a noncontroversial point: that departmental seniority systems are commonplace.

Very truly yours,

David W. Carpenter

David W. Carpenter

DWC:dsg
Enclosures
cc: Rex E. Lee (w/o enclosures)
Charles C. Jackson (w/o enclosures)
Stephen J. Feinberg (w/o enclosures)
Robert M. Weinberg (w/o enclosures)

RESEARCH METHODOLOGY & RESULTS

BNA PLUS, the custom research and document retrieval division of The Bureau of National Affairs, Inc., surveyed collective bargaining agreements in BNA's sample file of 399 contracts to determine the prevalence of departmental seniority provisions in collective bargaining contracts.

The Bureau of National Affairs, Inc. is a private, employee-owned publishing company specializing in labor, business, tax, legal, environment, and economic issues. BNA maintains a collection of more than 3,000 agreements, which is maintained primarily for the company's *Collective Bargaining Negotiations and Contracts* service. The file also is used for research purposes. The collection is kept up to date with the latest contract renewals or amendments. Within the collection, a sample of approximately 400 contracts is maintained with regard to a cross section of industries, unions, number of employees covered, and geographical areas. The sample is the basis for the *CBNC* analysis of basic patterns in union contracts, conducted every three years.

To determine the prevalence of departmental seniority provisions by industry, BNA PLUS labor analysts researched the contracts in the sample database (a listing of the contracts, by industry, is attached). One contract has been deleted from the sample and one was unavailable for examination. Of the 398 contracts examined, 359 (90 percent) contained language regarding seniority. For the purposes of this research, as agreed. BNA PLUS included as departmental seniority those instances where seniority is based on some subunit of the workforce (departments, sections, occupational groups, etc.) rather than length of service at a plant or with the company.

The project was coordinated by the BNA PLUS senior labor analyst, who has extensive experience in the labor area. In addition, the *CBNC* managing editor was available for consultation. A summary of findings is presented in the attached table.

Mary Dunn
Managing Editor, CBNC

Susan Korn
Senior Labor Analyst, BNA PLUS

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March 3, 1989

David W. Carpenter, Esquire
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RE: Lorance v. AT&T Technologies
No. 87-1428

Dear Mr. Carpenter:

I have received the letter dated March 3rd, from both respondents in response to my letter of March 2nd. The response does not address the concerns of the Petitioners.

For the reasons set forth in my letter of March 2, 1989, the outside-the-record material contained in the Respondents' Brief should be stricken.

In addition, the documents that you enclosed with the March 3, 1989 letter inadequately describe the private project that you sponsored. (We will lodge these documents with the Supreme Court if the material is not removed from the Brief). For example, the documents do not describe the seniority provisions from the contracts. All that is listed is the company name, industry, "sic" code, and the expiration date for the contract.

This is particularly important because these documents make clear that the chart contained in the Appendix to Respondents' Brief is mislabeled and misleading. The page listed as "Research Methodology & Results" states as follows:

> For the purpose of this research, as agreed, BNA Plus included as departmental seniority those instances where seniority is based on some subunit of the workforce (departments, sections, occupational groups, etc.) rather than length of service at a plant or with the company. (Emphasis added)

Contributions are deductible for U.S. income tax purposes.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 30 years a separate Board, program, staff, office and budget.

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BNA Plus, "the custom research and documental retrieval division of The Bureau Of National Affairs, Inc." apparently "agreed" with AT&T Technologies to call departmental any measure of seniority, "department[al], section[al], occupational, etc."

As is clear from the research methodology statement, BNA agreed to call any seniority system other than plant or company seniority a departmental seniority system.

On the basis of the research methodology statement, BNA Plus and the Respondents could as easily have called the less than plant seniority contracts "sectional" or "etc." seniority contracts.

Moreover, the Record in this case does not indicate whether or not the seniority system developed in 1979, which counted seniority earned in non-tester jobs differently than seniority earned in tester jobs, should properly be classified as "occupational," "departmental," or "sectional" seniority. The system appears more likely to be an "occupational" system, that is, one that distinguishes the tester occupations from other occupations, rather than a departmental system.

In any event, the critical point is that there is nothing in the documents provided by BNA that establishes any foundation for comparing the system in the Montgomery Works with those systems summarized in the chart included as an Appendix to the Respondents' Brief. At trial, the plaintiffs may show that the system adopted by the IBEW and AT&T Technologies dividing the seniority in the plant and pitting one group of bargaining unit employees against another was an arbitrary and irrational system unlike the vast majority of other contracts.

There is no information in the BNA "sample" that is inconsistent with Petitioners' position. In fact, an analysis of the contracts evaluated by BNA (under the direction of the attorneys for AT&T Technologies) may establish the plaintiffs' position.

Finally, you should not be "surprised" that we want to review the BNA material at this "late date." There is no reference in the Respondents' Brief to the fact that this a "customized" job done at the direction and by the "specifications" set by AT&T Technologies. Frankly, we never

would have thought that the Respondents sought to submit such outside-the-record material to the Supreme Court. Accordingly, we only checked the reference towards the end of the preparation of the Reply Brief.

For the reasons set forth in this letter and in the March 2nd letter, the material prepared by BNA should be stricken from the Brief because it is improper outside-the-record evidence and because it is misleading and unreliable.

Very truly yours,

Barry Goldstein

Barry Goldstein

BG:vyt

cc: Charles C. Jackson, Esquire
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March 6, 1989

BY TELECOPY

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Re: Lorance v. AT&T Technologies
No. 87-1428 (U.S. Supreme Court)

Dear Mr. Goldstein:

This is the response of both respondents to your letter of March 3, 1989. As we understand your objection to our use of BNA materials, it is that the chart is "mislabeled" and "misleading" because it uses the term "departmental seniority" to refer to all seniority systems where seniority is based on some subunit of the workforce (e.g., a department, a section, or an occupation) rather than length of service in the plant or with the company. We used the term departmental seniority system in this way because that phrase, in common parlance, encompasses all such systems. That is how the term was used, for example, in the other materials cited in our Brief (pp. 14-15 nn.15-16) to which you have not objected. In any event, it makes no difference whether such systems are called a "sectional" seniority system, an "occupational system," or a "group seniority" system. The point is that the materials in BNA's publicly-accessible database shows that however these systems are denominated, seniority systems (like AT&T's) that measure seniority based on service in a subunit of a company are commonplace. That is the only point that any of the materials we cited in footnotes 15 and 16 was intended to make.

Please let us know if we can do anything else to address your concerns.

Very truly yours,

David W. Carpenter

David W. Carpenter

DWC:dsg

cc: All Counsel

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA A. LORANCE, *et al.*,
Petitioners,

v.

AT&T TECHNOLOGIES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

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IN THE

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OCTOBER TERM, 1988

No. 87-1428

PATRICIA A. LORANCE, *et al.*,
Petitioners,

v.

AT&T TECHNOLOGIES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

This brief amicus curiae of the Equal Employment Advisory Council (EEAC) is respectfully submitted pursuant to the written consent of the named parties, and in support of the respondents.[1]

---

[1] Letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including over 200 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal aspects of EEO policies and requirements.

As employers, EEAC's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the other various federal orders and regulations pertaining to nondiscriminatory employment practices. Many are also subject to collectively-bargained or otherwise legitimately adopted seniority agreements. As such, EEAC members have a direct interest in the issues presented for the Court's consideration in this case; that is, for purposes of determining the timeliness, within the statute of limitations under Title VII, of a challenge to a facially-neutral, collectively-bargained seniority system, does the alleged discriminatory act occur on the date the system was adopted, on the date employees become subject to the system, or on the date employees were demoted pursuant to the system's operation.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court and other circuits which involved specifically the interpretation of Title VII's filing requirement, Section 706(e), 42 U.S.C. § 2000e-5(e), the statutory provision of primary concern here. *See Zipes v. Trans World Airlines*, 455 U.S. 385 (1982); *Delaware State College v. Ricks*, 449 U.S. 249 (1980); *Mohasco v. Silver*, 447 U.S. 807 (1980); *United Air Lines v. Evans*, 431 U.S. 553 (1977). *See also EEOC v. Commercial Office Products Co.*, —— U.S. ——, 108 S.Ct. 1666 (1988). In addition, EEAC has filed amicus briefs in other cases involving an analysis of Title VII challenges to the maintenance of allegedly discriminatory seniority systems. *Bazemore v. Friday*, —— U.S. ——, 106 S.Ct. 3000 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *California Brewers Ass'n v. Bryant*, 444 U.S. 596 (1980); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); and *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). Accordingly, because of the potentially enormous impact upon seniority systems and the rights and benefits accrued thereunder, this Court's consideration of this case is of vital concern to EEAC's nationwide employer constituency, as well as to countless unions and employees subject to such systems.

STATEMENT OF THE CASE

Patricia A. Lorance, Janice M. King and Carol S. Beuschen, Petitioners, have been currently employed as hourly wage workers at the Montgomery Works facility of Respondent AT&T Technologies ("AT&T") located in Aurora, Illinois.[2] (Pet. App. 4a). The

[2] Ms. Lorance and Ms. Beuschen have been employed at AT&T since 1970, and Ms. King has been employed since 1971. (Pet. App. 4a).

composition of the Montgomery Works labor force is approximately 75 percent female and 25 percent male. (R.68B at 117). Petitioners' union representative is Respondent Local 1942, of the International Brotherhood of Electrical Workers, AFL-CIO ("Union"). Within the hourly wage job category are jobs called "tester" positions which collectively comprise the "tester universe." (Pet. App. 4a). The tester jobs are among the highest paid hourly positions. (Pet. App. 4a). Historically, few women took the requisite courses and examination to become testers; consequently, most of the tester positions are occupied by men who either were directly hired into the position or who were promoted from the lower graded non-tester jobs. (J.A. 19 par. 12). As early as 1970, however, women increasingly became testers. By 1978, approximately 15 women occupied positions as testers, and several others prepared to complete the entry-level requirements. (J.A. 19-20 par. 13).

Prior to 1979, Respondents utilized a plant-wide seniority system which governed all job promotions, downgrades and layoffs. (Pet. App. 4a). Seniority was thus determined by an employee's total length of service. Application of the plant-wide seniority system created problems in the tester universe because those employees with seniority in the lower graded jobs were being promoted into the tester universe, at job grades higher than those who had more experience as testers. (J.A. 21 par. 16) Thus, testers with little or no tester experience, but greater plant seniority, had seniority over those with greater tester experience, but less plant-wide seniority. The end result was that testers in higher graded jobs did not have the skills or experience necessary to perform

the jobs at a time when the positions demanded an increase in technical knowledge and skills.

In response to this problem, Respondents collectively bargained a modification to the seniority system known as the "tester concept." [3] The tester concept assigned dual seniority dates to all new entrants into the tester universe, and these assignment dates governed all promotions and demotions within the tester universe.[4] (Pet. App. 4a). Petitioner Lorance was a tester at the time the tester seniority plan was adopted in 1979, and Petitioners Beuschen and King became testers in 1980. (Pet. App. 5a).

In late 1982, Petitioners were demoted during a reduction-in-force pursuant to the seniority provisions in the tester concept. (Pet. App. 5a). They subsequently filed EEOC charges alleging that their demotions had been unlawful under Title VII and that they would not have been demoted had the decision been based on plant-wide seniority. (Pet. App. 5a). In addition, Petitioners challenged the lawfulness of the seniority plan itself, even though the plan was adopted and they became subject to it more than 180 days—indeed, from two to three years—*before* the

---

[3] The tester concept was extensively discussed at union meetings. When the union held a special meeting to vote on the plan, all three Petitioners attended the meeting and voted against the plan. The tester concept plan was approved by a vote of 90 to 60, which reflected the approximate ratio of men to women in attendance at the meeting. (Pet. App. 5a).

[4] Plant wide seniority continued to govern all other matters, including layoffs, benefits, and job assignments for nontester grades. (Pet. App. 4a). Employees could "bridge" their tester seniority and plant seniority either by completing five years of service in the tester universe or successfully competing a five part training program.

filing of their charges.[5] The EEOC found no reasonable cause to believe that the allegations were true, and issued Petitioners right to sue letters. (Pet. App. 5a).

Petitioners pursued their action in district court and alleged in their complaint that the 1979 "changeover from plant seniority to tester seniority" was negotiated and adopted with discriminatory intent and constituted an "illegal" manipulative seniority system. The district court granted Respondents' summary judgment motion on the ground that Petitioners' claims were time-barred because they had failed to file their charges with the EEOC within Title VII's applicable statute of limitations. *See* Section 706(e), 42 U.S.C. § 2000e-5(e). (Pet. App. 32a-33a). Specifically, the court held that the statute of limitations began to run at the time Petitioners knew or should have known that they had lost their plant wide seniority when they became testers. (Pet. App. 26a, 32a). It concluded that Petitioners "sat on their rights," and thus rejected their arguments that the time period ran from the date of their demotions in 1982. (Pet. App. 25a-27a). The court, however, also rejected the magistrate's determination that the statute ran from the date the seniority plan was adopted in 1979. (Pet. App. 27a-31a). The district court

[5] Petitioners Lorance and Beuschen filed their EEOC charges on April 13, 1983, and Petitioner King filed her charge on April 21, 1983. (Pet. App. 18a). Respondents argued below that the 180-day rather than the 300-day limitations period applies in this case. The courts below, however, declined to address the issue and concluded that Petitioners' charges were time-barred under either period. (Pet. App. 6a n.2; 19a-20a n.3).

also found that Petitioners' claims did not constitute a continuing violation under Title VII.

The Seventh Circuit affirmed and decided that the assignment of seniority status to an employee triggers the statute of limitations on challenging the seniority system, even if the system is only later used to demote or to deny the employee a promotion.[6] It also affirmed the district court's rejection of the argument that the adoption of a seniority system is the relevant act which triggers the statute of limitations.

SUMMARY OF ARGUMENT

1. To determine whether a Title VII action is barred as outside the limitations period of Section 706(e), a court must first "identify precisely the 'unlawful employment practice' of which [the charging party] complain[s]" and determine when that practice occurred. *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980). Where, as here, the complaint involves a seniority system, Section 703(h) comes into play in making these determinations. For under Section 703(h), the uniform application of a facially-neutral seniority system cannot in itself constitute a violation of Title VII simply because the system has a present impact on minorities or women or perpetuates the effects of past discrimination. *E.g., American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

Implicitly recognizing these limiting effects of Section 703(h), Petitioners have based their complaint

[6] The court of appeals denied petitioners petition for rehearing and suggestion for rehearing *en banc*. (Pet. App. 1a-2a).

solely on the ground that AT&T's *original adoption* of its tester seniority system was illegal. (J.A. 14, 16).[7] Thus, they have at least tacitly conceded that the system was facially neutral and was applied evenhandedly to men and women testers during the limitations period. They have failed, however, to acknowledge the logical consequence of their tacit concession—that is, that because the specific gravamen of their complaint is that the original adoption of the tester seniority system was illegal, the time for any challenges to the system began to run when it was adopted in 1979.

This Court has long recognized, in construing the filing-time requirements of Title VII and other federal labor legislation, that where a finding of a violation within the limitations period is dependent on finding that some earlier action, completed before the limitations cutoff date, was unlawful, the action is barred. *United Air Lines v. Evans*, 431 U.S. 553 (1977); *Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960). These principles govern the case at bar.

Indeed, a reaffirmation of these settled principles is needed here, lest entire seniority systems throughout U.S. industry be rendered perpetually vulnerable to challenges under Title VII. Under the theory urged by Petitioners, any time a seniority system is applied to the disadvantage of any member of a class protected by Title VII, the system itself can be challenged on the grounds that its adoption was illegally

[7] Petitioners have conceded that the tester seniority system is neutral on its face, and they do not appear to dispute that it has been applied even-handedly to men and women in the "tester universe" at all times since its adoption in 1979.

motivated, even if the adoption occurred years or decades earlier. Similarly, even under the slightly more restrictive view adopted by the Seventh Circuit in this case, whole seniority systems would be placed in perpetual jeopardy, because each employee newly entering a unit governed by a separate seniority system would have 180 (or 300) days in which to attack the system as illegal from its inception. Either approach would severely undermine the congressional intent, reflected in Section 703(h), that Title VII not be used to disrupt the legitimate expectations of employees based on neutral seniority systems.

Petitioners' efforts to circumvent these principles through reliance on a continuing violation theory are unavailing. To find a continuing violation, a court must be able to find that at least one action or occurrence within the limitations period was, in and of itself, unlawful. *Evans*, 431 U.S. at 558; *Machinists*, 362 U.S. at 416. Prior events can be used as background evidence to shed light on the character of actions within the limitations period, but where the court has to pass on the legality of some pre-limitations conduct in order to find a violation within the limitations period, the proceeding is barred. That is precisely the situation presented here. Hence, the continuing violation theory simply does not apply.

2. Alternatively, even apart from the implications of Section 703(h), Petitioners cannot prevail in this case, because they clearly sat on their rights long after they became subject to the tester seniority system and knew precisely how it affected their rights. Thus, even where seniority rights are not involved and a company practice may be challenged as discriminatory without reference to the legality of its

initial adoption, a charge is untimely if not filed within 180 days (or 300) days after the charging party knows or reasonably should know that the allegedly discriminatory practice has occurred. In this case, the limitations period began to run, at the very latest, on the date when Petitioners were transferred into the tester unit and became subject to the system of which they now complain. As that date was far more than 180 (or 300) days before Petitioners filed their charge, their action is clearly time-barred in any event.

ARGUMENT

I. IN A TITLE VII CHALLENGE TO A FACIALLY NEUTRAL SENIORITY PLAN, THE STATUTE OF LIMITATIONS BEGINS TO RUN FROM THE TIME THE SENIORITY PLAN IS ADOPTED.

A prerequisite to initiating a suit for a violation of Title VII is the filing of a timely charge with the EEOC. A Title VII plaintiff must therefore file a discrimination charge with the EEOC within 180 days of the "alleged unlawful employment practice." Section 706(e), 42 U.S.C. § 2000e-5(e); *see also Delaware State College v. Ricks*, 449 U.S. 250, 256 (1980).[8] The issue of when the cause of action accrues depends on when the alleged unlawful act occurred. It is necessary, therefore, to identify the unlawful act. "Only then can the court separate the discriminatory act from the natural consequences flowing therefrom." *Weibley v. Westinghouse Electric Corp.*, 683 F. Supp. 111, 114 (E.D. Pa. 1988).

[8] In those states which have a comparable law and procedures for handling similar civil rights complaints, that is, deferral states, the statute of limitations period is extended to 300 days for filing with the EEOC. Section 706(e), 42 U.S.C. § 2000e-5(e).

This case involves a facially neutral seniority system which has been challenged by Petitioners as being unlawfully adopted. The essence of the violation involves the circumstances which surrounded the negotiation of the tester concept and its subsequent adoption. Therefore, the relevant act that triggered the running of the statute of limitations was the adoption of the tester seniority plan in 1979. Petitioners and their *amici* assert that the relevant act which triggered the running of the statute of limitations period was their demotions in 1982. These arguments, however, fail to make the necessary distinction between an "act" and its "consequences." For it is this distinction that is crucial to a determination of timeliness under Title VII.

Petitioners' demotions are merely the consequences of AT&T's implementation of the tester seniority provisions pursuant to a reduction-in-force. The demotions are not separate, independent acts which themselves trigger the limitations period; rather, the demotions are a function of the operation of the tester seniority system itself. The system thus was subject to challenge only when it was adopted, and Petitioners cannot now challenge its consequences or derivative effects.

A. In Attacking The Adoption Of The Tester Seniority System, Petitioners Must Base Their Claim On The Assertion That Events In 1979, Which Were Never Made The Subject Of A Timely Charge, Were Unlawful.

When Congress enacted Title VII, it sought to assure equality of employment opportunities and to eliminate discriminatory employment practices. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *see also Griggs v. Duke Power Co.*, 401 U.S.

424 (1971). Accordingly, Section 703(a), 42 U.S.C. § 2000e-2(a), was designed to prohibit employment discrimination with respect to compensation, terms, conditions, or privileges of employment; and with respect to practices that limit, segregate, or classify in any way which would deprive or tend to deprive any individual of employment opportunities. 42 U.S.C. § 2000e-2(a). However, Section 703(h), 42 U.S.C. § 2000e-2(h), adopts a different standard for challenges to bona fide seniority systems, by providing that,

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.

This Court analyzed Section 703(h) in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters* involved a situation where minority employees had been discriminatorily assigned upon hire to "city driving" jobs rather than to the higher paying over the road "line driving" jobs. Among the claims argued by the government was that the seniority system adopted by the company and the Teamsters was unlawful in that it perpetuated these discriminatory assignments. These claims arose from the fact that the city driving jobs and the line driving jobs were in separate bargaining units, and that an employee who transferred from one to the other could not bring with him his accumulated seniority. The Court, however, rejected the government's position and held:

> [A]n otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.

Id. at 353-54.

The Court observed that the unmistakable purpose of Section 703(h) was to make it clear that the routine nondiscriminatory application of a seniority system would not be unlawful under Title VII. *Id.* at 352-53; *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977); *United States v. Trucking Management, Inc.*, 662 F.2d 36, 44 (D.C. Cir. 1981) ("The *Teamsters* Court read the legislative history of Title VII as revealing plain congressional intent to *protect seniority rights*, so long as those rights are preserved by a 'bona fide' seniority system.") (emphasis in original).

Furthermore, this Court expressly found that Section 703(h) applied to all types of seniority systems, including departmental systems.

> In addition, there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant wide systems. Then as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . The legislative history contains no suggestion that any one system was preferred.

Id. at 355 n.41.

On the same day, the Court in *United Air Lines v. Evans*, 431 U.S. 553 (1977), concluded that a discriminatory act which is not made the basis of a timely EEOC charge has no legal significance, other than as background evidence. Evans was employed by United as a flight attendant from November 1966 to February 1968, at which time she married and was forced to resign because United maintained a policy of refusing to allow its female flight attendants to be married. The policy was subsequently found to be in violation of Title VII. Evans was rehired in 1972, and in 1973 filed Title VII charges claiming that United had committed an unlawful employment practice by refusing to credit her with seniority for any period prior to February 1972. No charge had been filed with the EEOC within the appropriate time period after plaintiff was forced to resign in 1968. The Court considered whether United had committed a violation of Title VII by refusing to credit Evans with seniority for any period prior to February 1972, and stated:

> [A] challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).

Id. at 560.

Writing for the Court in *Teamsters*, Justice Stewart commented further that,

> *Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. Here, of course, the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time-barred. But this is simply *an additional reason not to hold the seniority system unlawful*, since such a holding would in no way enlarge the relief to be awarded.

Teamsters, 431 U.S. at 348 n.30 (emphasis added) (citations omitted). *Evans* thus developed the *Teamsters* rationale further and teaches that if no timely charge is filed concerning the initial job assignment, employees are precluded by Section 703(h) from challenging the perpetuating effects of a seniority system.

Finally, in *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), the Court addressed the issue of whether Section 703(h) applied to post-Act adopted seniority systems or whether it was designed to protect only those systems that were adopted before the effective date of Title VII in 1965. The Court agreed with the argument of the Petitioners in that case that "the plain language of § 703(h) applie[d] to post-Act as well as pre-Act seniority systems," and it rejected EEOC's contention that "§ 703(h) . . . protect[ed] the post-Act *application* of a bona fide seniority system but not the post-Act *adoption* of a seniority system or an aspect of a seniority system." *Id.* at 68.

In the Court's view, "[t]he EEOC's reading of § 703(h) would make it illegal to adopt, and in prac-

tice to apply, seniority systems that fall within the class of systems protected by the provision . . . ." Consistent with its prior decisions which "emphasize that 'seniority systems are afforded special treatment under Title VII itself,' " the Court concluded:

> Thus taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that '[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discriminatory impact. . . . Section 703(h) makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date. Consistent with our prior decisions, we decline respondents' invitation to read such a distinction into the statute.

Id. at 75-76 (citations and footnote omitted).

The theories which govern the application of the Section 703(h) exemption and which were developed in these decisions are particularly applicable in this case. Because of Section 703(h), Petitioners are limited in the grounds on which they can attack the tester seniority system. They cannot contend that its current application has adverse impact. They cannot argue that it is illegal because it perpetuates the effects of past discrimination. They are not able, on the facts of this case, to contend that the system was administered and maintained with a discriminatory motive during the limitations period.

Petitioners are forced, therefore, to focus their challenge entirely on the adoption of the tester seniority plan and to contend that the seniority system

itself is unlawful because AT&T acted with unlawful motives in 1979. Thus, the precise "unlawful employment practice" of which Petitioners complain occurred, if at all, entirely in 1979. Unless the adoption of the system is found illegal, its application to Petitioners cannot be found illegal. And because the adoption was not made the subject of a timely charge, it is a mere "past event which has no present legal significance," *Evans*, 431 U.S. at 560, and cannot be a basis for finding a current violation.

Petitioners attempt to distinguish *Evans* on the ground that the plaintiff there "did not assert that the seniority system itself was illegal but merely that the system perpetuated the effects of the illegal policy of forced termination which the company no longer applied." (Pet. Br. at 40). The distinction does not wash, however. *Teamsters* and *Evans* apply and govern the precise fact situation in this case—that is, an instance where employees have challenged the current application of a facially neutral seniority system based solely on a contention that an event occurring years earlier was unlawful. But, as the event in question—here the adoption of the system—was never made the subject of a timely charge, it is precisely the sort of time-barred allegation to which the Court was referring in *Evans*.

Furthermore, Petitioners' reliance upon *California Brewers Ass'n v. Bryant*, 444 U.S. 596 (1980), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), is misplaced. While this Court addressed Section 703(h) in *California Brewers*, that decision merely determined that certain provisions of a collective bargaining agreement constituted a seniority system. The opinion focused on *what* constituted a seniority

system, rather than *when* a seniority system should be challenged. The Court broadly defined the term "seniority" in order to arrive at a workable definition of its meaning and to give it the fullest possible application under Section 703(h). 444 U.S. at 605. Thus, *California Brewers* supports the Respondents, not the Petitioners in the instant case.[9]

Similarly, Petitioners erroneously rely upon this Court's decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). *Satty* involved an employer's policy of denying accumulated seniority to employees returning from pregnancy leave but not to employees returning from other types of disabilities. While the majority of the Court commented that the policy "appear[ed]" on its face to be sex-neutral, the Court went on to find that the policy presently discriminated against women as a class, because only women become disabled because of pregnancy. *Id.* at 141-43. The motivation for the adoption of the policy was not an issue, and the Court was not required to consider the legality of any conduct pre-dating the statute of limitations period.

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[9] Moreover, unlike the plaintiffs in *California Brewers*, Petitioners here have not challenged whether the assignment of dual seniority dates for testers is a "seniority system" or "part of a seniority system" within the meaning of Section 703(h). *See California Brewers*, 444 U.S. at 601. Indeed, they concede that this is a seniority case. Yet, Petitioners rely on that case for the general proposition that "workers may challenge as an unlawful employment practice the operation of long-established seniority system." (Pet. Br. at 37). *California Brewers*, though, does not in any way diminish the necessity for a timely claim and a showing, under *Teamsters* and *Evans*, that the challenged seniority system is a result of intentional discrimination. 444 U.S. at 611.

Petitioners argue that the Seventh Circuit's holding would have precluded the plaintiffs in *California Brewers* and *Satty* from ever challenging the operation of the seniority system. This argument misses the mark, however, because: 1) neither case involved a Section 703(h) challenge to a seniority system; 2) neither case involved an interpretation of the filing requirements under Title VII's statute of limitations; and 3) *Satty* is a disparate impact rather than a disparate treatment case.

Finally, contrary to Petitioners' claims, *Teamsters* and *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), do not support their theories, but underscore that Petitioners' complaint in this case is untimely. There was no statute of limitations issue in *Teamsters* because the operation of the seniority system had to be conceded to be lawful once the Court held that systems are valid under Section 703(h) even if they perpetuate the effects of past discrimination. The Court went on to observe that the system was protected by Section 703(h) because it applied equally to all races, that the placement of line drivers in a separate bargaining unit was rationale and in accord with NLRB precedents, and that the system did not have its genesis in racial discrimination and was negotiated and maintained free from any illegal purposes. *Teamsters*, 431 U.S. at 355-56; *see Evans*, 431 U.S. at 560.

In *Swint*, the plaintiff challenged the legality of a seniority system under Section 703(h). Again, no statute of limitations issue was raised because there, unlike here, the plaintiffs contended that the system had been adopted, maintained and administered with racially discriminatory purposes over a 35-year

period that extended the limitations period. There, the Court reversed the Court of Appeals' holding that the "totality of the circumstances in the development and maintenance of the system showed that the system was intentionally discriminatory in violation of Section 703(h)."[10] This Court reversed because the appellate court had applied an erroneous standard of review of the district court's factual findings.

B. Petitioners May Not Evade Title VII's Stringent Time Limits Merely By Characterizing Their Claim As A Continuing Violation.

Petitioners attempt to evade the mandates of this Court's prior decisions by characterizing their claim as a "continuing violation." However, to find a continuing violation, a court must be able to find that at least one action or occurrence within the limitations period was, in and of itself, unlawful. *See Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 416 (1960). Prior events can be used as background evidence to shed light on the character of

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[10] The court of appeals had focused on four factors in assessing the lawfulness of the system:

> First, a court must determine whether the system 'operates to discourage all employees equally from transferring between seniority units' . . . . Second, a court must examine the rationality of the departmental structure, upon which the seniority system relies, in light of the general industry practice. . . . Third, a court had to consider 'whether the seniority system had its genesis in racial discrimination,' . . . by which it meant the relationship between the system and other racially discriminatory practices. . . . Finally, a court must consider 'whether the system was negotiated and maintained free from any illegal purpose.'

Swint, 456 U.S. at 279-81 (citations omitted).

actions within the limitations period, but where the court has to pass on the legality of some pre-limitations conduct in order to find a violation within the limitations period, the proceeding is barred. Petitioners' continuing violation claim falls into precisely this situation, and was specifically rejected in *Machinists* and *Evans*. In *Machinists*, the Court noted that "[the] collective bargaining agreement and its enforcement are both perfectly lawful on the face of things," and that an unlawful act "cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject" of a timely complaint. *Id.* at 419. The Court concluded:

> [T]he vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered . . . . *In any real sense, then, the complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution.* To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the [statute of limitations provisions of the National Labor Relations Act, 29 U.S.C. § 160(b)] is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a *suable*

> unfair labor practice only for six months following the making of the agreement.

Id. at 423 (emphasis added in part). Furthermore, in *Evans*, the Court stated:

> [A] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed . . . Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question in whether any present *violation* exists. . . .

Id. at 558 (emphasis in original).

The tester seniority system is nondiscriminatory on its face and as applied. Thus, Petitioners' claim that the application of the system to them was illegally discriminatory necessarily requires the court to find that a violation of Title VII occurred when the system was adopted in 1979—*i.e.*, more than 180 (or 300) days before any charge was filed. Since no claim was asserted within that limitations period, Petitioners not only are barred from challenging the system outside of the limitations period, but also are precluded from making a continuing violation claim.

Petitioners' collateral argument that the demotions which resulted from the operation of the seniority system are each a continuing violation is also groundless. At best, Petitioners have only shown that their demotions are merely continuing *effects* of *past* rather than *present* discriminatory acts. They appear to concede that since the seniority plan was

adopted, it has been maintained and equally applied to all employees regardless of sex. That being true, their demotions are a function of the operation of an admittedly facially neutral system. In short, there are no present discriminatory acts here, only allegations concerning the effect of a past act. Under *Evans* and *Machinists*, such allegations are now time-barred and are no longer of any legal significance. Petitioners also have failed to allege any other conduct which would indicate that AT&T engages in *current* discriminatory practices based on sex.

It is for these reasons that Petitioners' reliance upon *Bazemore v. Friday*, —— U.S. ——, 106 S.Ct. 3000 (1986), is misplaced. In *Bazemore*, the Court concluded that salary scales based on proven patterns of current discrimintory treatment (*i.e.*, currently paying blacks less than whites for performing the same jobs) must be eliminated. It further held that a difference in salary between racial groups cannot be justified by the simple fact that the current salary is product of past or illegal discrimintion. *Bazemore* is distinguishable on several grounds. First, the timeliness of the plaintiffs' charges was not at issue. Second, the challenged salary disparities fell squarely within the scope of a "continuing violation" because the salary system was not neutral on its face, but rather constituted a *current* "pattern or practice" of race-based discrimination which treated "similarly situated" blacks and whites differently and which "continued" into the filing period. *Id.* at 3006. *Bazemore* does not support Petitioners' argument and is further distinguishable from *Evans* because the *Bazemore* defendants were engaged in a "present violation." *Evans*, 431 U.S. at 558; *Bazemore*, 106 S.Ct. at 3007 n.6 (the court emphasized

that "[b]ecause the employer in [*Evans*] was not engaged in discriminatory practices at the time the respondent . . . bought suit, there simply was no violation of Title VII.").

C. Enforcement Of The 180-day Statute Of Limitations Is Necessary To Protect Employers From The Burden Of Defending Stale Claims And To Effect Congress' Intent That Title VII Not Be Used To Disrupt Legitimate Expectations Based on Seniority Systems.

Under Petitioners' theory, seniority systems would constantly remain vulnerable to attack based on acts which occurred long before the filing of EEOC charges. Such a result, however, is inconsistent with this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 249 (1980). In *Ricks*, the Court explained the dual purpose of the limitations periods applicable to the civil rights laws:

> The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.

Id. at 256-57. This Court has thus emphasized the congressional intent to limit an employer's liability for stale claims.

Important policy considerations support strict enforcement of the statute of limitations in Title VII cases generally. It protects employers from having to produce, many years subsequent to the occurrence of an unlawful employment practice, witnesses and documents that may well no longer be available. The concern for avoiding stale claims is especially pronounced in the context of civil rights and employment actions, where the intent with which an alleged discriminatory action was taken is often of paramount significance to a determination of liability.

In the context of this case, these policies of repose take on an even greater significance in light of the congressional concern, reflected in Section 703(h), that Title VII not be used to disrupt employees' legitimate expectations based on facially-valid, collectively bargained seniority systems. The security and predictability that are the *raison d'etre* for seniority systems would be severely undermined if such systems are made perpetually subject to attack on the grounds that their initial adoption was improperly motivated, no matter how many years have elapsed nor how many employees have relied on the system in the interim. Yet that would be the inescapable consequence of adopting Petitioners' argument in this case. That is, if every application of a seniority system that results in a layoff, demotion or transfer triggers a new period of 180 (or 300) days in which the legality of the system's original adoption can be reopened and litigated, every seniority system will in practical effect be rendered perpetually vulnerable, and the security and stability which employers, unions and employees seek to derive from negotiating seniority rights will be illusory.[11]

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[11] The same unfortunate result would follow from the rationale adopted by the Seventh Circuit in this case, as it would effectively grant each new entrant into a unit governed by a separate seniority system a period of time in which to challenge the system, litigate the motives with which it was originally negotiated, and seek to have the entire system set aside, no matter how long it had been in place.

II. ALTERNATIVELY, PETITIONERS' CLAIM IS BARRED BECAUSE IT WAS NOT TIMELY-FILED AFTER THEY BECAME SUBJECT TO THE TESTER SENIORITY SYSTEM AND AWARE OF ITS EFFECT ON THEIR RIGHTS.

Even where seniority rights are not involved, this Court has consistently held that a charging party must, at the very least, file within 180 (or 300) days after he or she is notified of an adverse employment decision. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *accord Chardon v. Fernandez*, 454 U.S. 6 (1981). Though the adverse effects of the decision may not actually take place until later, the time is measured not from when the employee is affected, but from when the employee *learns* of the discriminatory acts. In *Ricks*, the Court held that the limitations period ran not from when the plaintiff-professor was terminated, but from when he was notified of the decision to deny him tenure. In *United Air Lines v. Evans*, 431 U.S. 553 (1977), the time ran from the date of the plaintiff's original termination pursuant to the "no-marriage" policy; once that was done, the implementation of the decision in another employment action was not a separate discriminatory act. The focus is therefore on "what event, in fairness and logic, should have alerted a lay person to act to protect his or her right[s] when he [or she] should have perceived discrimination occurring." *Serpe v. Four-Phase Systems, Inc.*, 718 F.2d 935, 938 (9th Cir. 1983).

Here, at a minimum, Petitioners were fully aware that their seniority rights would be affected as early as 1979 when the union conducted meetings to dis-

cuss the proposed modifications.[12] At the very least, they knew the day they became testers that they would be required to forfeit their plant-wide seniority. Petitioner Beuschen testified that they lost the right to exercise plant seniority for transfers and promotions "the day we went into testing." (Beuschen Dep. 39, 40). Each of the Petitioners also knew that she could "bridge" her seniority by completing the five part training course, because each embarked on the training program. It cannot be said then, that Petitioners were unaware of Respondents' actions, or that they did not know the extent to which the system would affect them, or that they did not know that, at some point, they would ultimately be subject to the system.

In these circumstances, even apart from the effect of Section 703(h), Petitioners clearly waited too long before asserting their claims. Indeed, it would be an anomalous situation if, after Petitioners had unequivocal and unambiguous notice that their seniority would be forfeited when they became testers, they could "sit on their rights" for years and then raise

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[12] At the final meeting, each of the Petitioners attended and voted against the tester concept. (Pet. App. 5a). Furthermore, Petitioners' deposition testimony indicates that they objected to the adoption of the tester plan in 1979. Petitioner King stated, "[a]lready by this time [in 1979] I had made the decision in my mind that what was going on was illegal and that I was going to continue my schooling, get my job and stick to my guns and let a court decide what was right or wrong." (King Dep. 22, 146). Petitioner Lorance voted against the tester concept plan because, in her words, "I have worked for this company a long time and I think my time should be recognized." (Lorance Dep. 93-98). Thus, Petitioners objected to the seniority system, yet failed to assert a timely challenge to its lawfulness.

challenges to the lawfulness of a concededly facially neutral seniority system. As the Seventh Circuit has observed:

> Indeed there are no policy grounds that would support tolling the running of the filing period beyond the point at which the employee is aware that the alleged discriminatory action has occurred. Once the employee knows of the termination, he has ample time in which to commence an action for relief. This remains true in even if the form of the notice is not in accordance with the employer's standard policy.

Mull v. Arco Durethene Plactics, Inc., 784 F.2d 284, 291 (7th Cir. 1986). Thus, at a minimum, Petitioners claims are time-barred because they waited much more than 180 (or 300) days after they became subject to the seniority system to file their EEOC charges.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the Petitioners' claims are time-barred and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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